(23,101)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 581.

THE MITCHELL STORE BUILDING COMPANY, APPELLANT,

vs.

R. DE V. CARROLL, TRUSTEE IN BANKRUPTCY OF THE HERMAN KECK MANUFACTURING COMPANY, BANKRUPT.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1913.

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a United States Circuit Court of Appeals, Sixth Circuit.

No. 2161.

THE MITCHELL STORE BUILDING COMPANY, Petitioner and Appellant,

vs.

R. DE V. CARROLL, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Bankrupt, Respondent and Appellee.

Petition to Review, and Appeal from an Order of the District Court of the United States for the Southern District of Ohio.

Record.

Petition for Review Filed February 24, 1911.

Transcript on Appeal Filed March 14, 1911.

1 TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals for the Sixth Circuit. In Bankruptcy.

In the Matter of THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Petition of the Mitchell Store Building Company for Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The petition of The Mitchell Store Building Company respectfully shows unto the court:

That it is the owner of certain real estate numbered 19-25 West Fourth Street, Cincinnati, Ohio, and on August 30, 1900, it executed a written lease thereof to The Duhme Jewelry Company, a corporation under Ohio laws for the term of ten years and two months from November 1, 1900, to December 31, 1910. Said Duhme Jewelry Company was engaged in the business of conducting a retail jewelry store on said premises, and the lease above referred to was made in good faith, and to The Duhme Jewelry Company alone as a separate and distinct corporation from The Herman Keck Manufacturing Company, bankrupt herein.

A portion of said leased premises was occupied by The Herman Keck Manufacturing Company, a corporation under the laws of Ohio, bankrupt herein, under an arrangement made by it with said Duhme Jewelry Company, and said Keck Manufacturing Company was engaged in the business of manufacturing jewelry.

On February 8, 1909, a petition in bankruptcy was filed against The Herman Keck Manufacturing Company in the United States District Court for the Southern District of Ohio, Western Division, and a receiver of its assets and property appointed on the same day. On said date said The Herman Keck Manufacturing Company was insolvent.

On the same date the same petitioning creditors in said bankruptcy proceedings made an application for a receiver of The Duhme Jewelry Company, alleging that said Duhme Jewelry Company was a department and adjunct of said Keck Manufacturing Company, and that it was essential and necessary for the
2 protection of the creditors of the Keck Manufacturing Company, and the preservation of the estate of the Keck Manufacturing Company in bankruptcy, that a receiver be appointed to take charge of the assets and property of said Duhme Jewelry Company, and on said date a receiver was appointed for the assets and property of said Duhme Jewelry Company. On said date The Duhme Jewelry Company was solvent, with assets in excess of liabilities.

After February 8, 1909, the receiver of The Duhme Jewelry Company continued to occupy said premises and paid the rental for said premises at the rate specified in said lease up to and including June 30, 1910, when he vacated said leased premises, having elected not to take or assume said lease by virtue of an order of the bankruptcy court entered June 9, 1910. There was no rental due the lessor from The Duhme Jewelry Company at the date of the petition in bankruptcy against The Herman Keck Manufacturing Company, and no petition in bankruptcy was ever filed against the Duhme Jewelry Company as such.

After the premises had been vacated on June 30, 1910, by the receiver or trustee in bankruptcy, they were abandoned by The Duhme Jewelry Company, and thereupon on October 8, 1910, your petitioner brought an action against The Duhme Jewelry Company, lessee, in the Common Pleas Court of Hamilton County, Ohio, for damages for breach of the covenant contained in said lease relating to the payment of rental accruing after June 30, 1910, and for breach of other covenants arising from the abandonment of said premises by said lessee, praying in said action for judgment against said The Duhme Jewelry Company in the sum of Sixty-five Hundred ($6,500.00) Dollars, as damages for said breaches of covenant. Service of summons was made upon said Duhme Jewelry Company in said action on October, 1910.

The Keck Manufacturing Company was adjudicated a bankrupt on December 3, 1909, and a trustee duly elected thereafter, and the property of both companies was sold by order of court, and the proceeds of sale of The Duhme Company's assets was turned over to the trustee of The Herman Keck Manufacturing Company and kept in a separate account, by an order of the District Court entered June 2, 1910, wherein, upon petitions of the trustee of The Herman Keck Manufacturing Company, and the Receiver of the Duhme

Jewelry Company, it was found that the property and assets of The Duhme Jewelry Company in the hands of its Receiver was the property of the bankrupt. Your petitioner was not a party to
3 these bankruptcy proceedings or to the proceedings wherein it was found that the property of The Duhme Jewelry Company belonged to The Herman Keck Manufacturing Company; and the cash in the hands of said trustee derived from the assets of said Duhme Jewelry Company is more than sufficient to pay all known claims against said The Duhme Jewelry Company including your petitioner's claim asserted in said Court of Common Pleas.

On November 23, 1910, the trustee in bankruptcy of the estate of the Herman Keck Manufacturing Company filed in the District Court of the United States for the Southern District of Ohio, Western Division, a petition alleging that among the assets of said bankrupt's estate in his possession was the sum of Fifty-two Thousand and Three and 80-100 ($52,003.80) Dollars remaining from the proceeds of sale of the property of The Duhme Jewelry Company, which by decree of said District Court had been adjudged to be the property of The Herman Keck Manufacturing Company and belonged to said trustee as such, and said trustee alleged in said petition that the aforesaid suit filed by your petitioner in the Common Pleas Court of Hamilton County, Ohio, for a judgment of Sixty-five Hundred Dollars against said The Duhme Jewelry Company, constituted a cloud upon the title and possession of the said trustee to said cash of The Duhme Jewelry Company in his hands, and a hindrance to its speedy and proper distribution to creditors of said bankrupt, and prayed that your petitioner be made a party to said proceeding and ordered to set up whatever claim it might have in and to said cash in the hands of said Trustee.

Your petitioner further avers that on the same date, to-wit, November 23, 1910, an order was made by the Referee in said bankruptcy case ordering your petitioner made a party to said proceeding and ordering it to set up therein whatever claim it might have against said The Duhme Jewelry Company, or the cash in said Trustee's hands, and ordering a writ of subpœna to be issued for your petitioner, requiring it to answer said petition; and thereupon, before any further action was taken by your petitioner, said trustee on December 9, 1910, filed a motion in said District Court for an order restraining your petitioner from proceeding with or continuing the prosecution of the said suit brought by it in the Common Pleas Court of Hamilton County, Ohio, until further order of the court, which motion came on to be heard before Honorable John S. Slater, Judge of said District Court, and thereupon the said court entered
4 an order on February 15, 1911, enjoining your petitioner, its officers, agents, servants, attorneys, and each of them, until further order of court, from proceeding with or continuing in any way the prosecution of said suit against The Duhme Jewelry Company in the Court of Common Pleas of Hamilton County, Ohio, to which your petitioner excepted.

A transcript of the original papers, pleadings, and agreed state-

ment of facts upon which said cause was heard, as recited in said order, is filed herewith.

Your petitioner charges the fact to be that the said District Court erred in granting the motion of said trustee and in restraining your petitioner from proceeding with its suit against said The Duhme Jewelry Company; that said District Court had no jurisdiction or power to restrain your petitioner from prosecuting said suit; and that upon the facts presented to said court on said hearing as recited in said order, and contained in the transcript filed herewith, said court erroneously granted said temporary injunction.

Your petitioner avers that it is aggrieved by the order of injunction and prays this honorable court to review and revise the said order made by said District Court, and further prays that said order may be set aside and held for naught, and for such other relief as to this honorable court shall seem proper under the circumstances of the case.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorneys for Petitioner.

STATE OF OHIO,
Hamilton County, ss:

A. J. Redway, being first duly sworn, says that he is the Secretary of The Mitchell Store Building Company, the above petitioner, and makes solemn oath that the statements contained in said petition are true according to the best of his knowledge, information and belief.

A. J. REDWAY.

Sworn to before me and subscribed in my presence this 21st day of February, 1911.

P. LINCOLN MITCHELL,
Notary Public in and for Hamilton County, Ohio.

United States Circuit Court of Appeals for the Sixth District. In Bankruptcy.

In the Matter of THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

5 To Maxwell & Ramsey, Attorneys for R. de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company:

You are hereby notified that on the 21st day of February, 1911, at twelve o'clock M., we will file in the Clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit in the City of Cincinnati, Ohio, a petition for review in the above entitled cause, a copy of which petition is hereto attached as a part of this notice, and we will then ask to have the case docketed and the necessary order made therein to have such case set down for hearing.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorneys for Petitioner.

We hereby accept service of the above notice this 21st day of February, 1911.

MAXWELL & RAMSEY,
Attorneys for R. De V. Carroll, Trustee in Bankruptcy of The Herman Keck Mfg. Co.

No. 2161. United States Circuit Court of Appeals, for the Sixth Circuit. In the Matter of The Herman Keck Mfg. Co., Bankrupt. Petition of The Mitchell Store Bldg. Co. For Review. Filed Feb. 24, 1911. Frank O. Loveland, Clerk. P. Lincoln Mitchell and De Camp & Sutphin, Attorneys for Petitioner.

Petition of Robert De V. Carroll, Trustee.

Filed with Referee Nov. 23, 1910.

United States District Court, Southern District of Ohio, Western Division.

No. 4281. In Bankruptcy.

In re THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Petition of Robert De V. Carroll, Trustee of the Estate of The Herman Keck Manufacturing Company, Bankrupt.

Your petitioner respectfully represents to the Court that he is the duly elected, qualified and acting Trustee of the Estate of The Herman Keck Manufacturing Company, bankrupt herein; that among the assets of said Estate now in his hands as such Trustee for distribution among the creditors of said bankrupt, is the sum of $52,003.80, remaining from the proceeds of the sale, under former orders of this Court, of the property of The Duhme Jewelry Company, which property was by the decree of this Court entered herein on June 2nd, 1910, duly adjudged to be the property of and belong to your petitioner as such Trustee.

6 Your petitioner further represents to the Court that on October 7, 1910, The Mitchell Store Building Company, a corporation organized and existing under the laws of the State of Ohio, a citizen of said State and a resident of the Western Division of the Southern District thereof, having its office and principal place of business in the City of Cincinnati in said State of Ohio, filed a petition against said The Duhme Jewelry Company in the Common Pleas Court of Hamilton County, Ohio, being cause No. 146,389 on the docket of said court, praying for a judgment against said Duhme Jewelry Company for the sum of $6,500.00 with interest from the first day of July, 1910, on account of rent alleged to be due to it from said Duhme Jewelry Company under and by virtue of a lease between said companies dated August 30, 1900, for the use and occupation of certain parts of said Mitchell Store Building

Company's premises in said City known as Nos. 21, 23 and 25 West Fourth Street, and also on account of certain alterations made by said Duhme Jewelry Company to certain parts of said premises.

Your petitioner further represents to the Court that service of summons has been made on said Duhme Jewelry Company in said case; that the said claim made by said Mitchell Store Building Company and said suit brought by it to enforce the same, constitute a cloud upon the title and possession of your petitioner to said assets of said Duhme Jewelry Company now in his hands as Trustee of the Bankrupt herein, and a hindrance to their speedy and proper distribution by him to creditors of said bankrupt, and that it is necessary for the complete determination of said claim and for a speedy and proper distribution of said assets to creditors of said bankrupt, that said The Mitchell Store Building Company be forthwith made a party to this proceeding.

Wherefore your petitioner prays that said The Mitchell Store Building Company be forthwith made a party to this proceeding and ordered to set up herein whatever claim or claims, if any, it may have against said Duhme Jewelry Company or its said assets now in his hands as aforesaid; that notice of the pendency and prayer of this petition, in such form as the Court may *seem* proper, be given to or served upon said The Mitchell Store Building Company, and for such other or further relief as he may be entitled to in the premises.

ROBERT DE V. CARROLL,
Trustee of the Estate of The Herman Keck Manufacturing Co., Bankrupt.

7 MAXWELL & RAMSEY,
Attorneys for the Trustee in Bankruptcy.

STATE OF OHIO,
Hamilton County, ss:

Robert de V. Carroll, being first duly sworn, says that he is Trustee of the Estate of The Herman Keck Manufacturing Company, bankrupt, and that the allegations of his foregoing petition are true, as he verily believes.

ROBERT DE V. CARROLL.

Sworn to before me and subscribed in my presence, this 22nd day of November, 1910.

JOSEPH L. LACKNER,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

Order of Charles T. Greve, Referee.

Entered Nov. 23, 1910.

United States District Court, Southern District of Ohio, Western Division.

No. 4281. In Bankruptcy.

In re THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Order Making The Mitchell Store Building Company Party to This Proceeding.

This cause came on for hearing this day on the petition of Robert de V. Carroll, Trustee herein, to make The Mitchell Store Building Company a party to this proceeding, notice of the filing of said petition having been given to said The Mitchell Store Building Company by said Trustee, and was submitted to the Court by counsel for said Trustee. On consideration whereof the Court finds that it is necessary for the complete determination of the claim of said The Mitchell Store Building Company referred to in said petition of said Trustee and for a speedy and proper distribution of the assets of the Duhme Jewelry Company now in the hands of said Trustee for distribution to creditors of the bankrupt herein that said The Mitchell Store Building Company be forthwith made a party to this proceeding, and

It is therefore ordered that the said The Mitchell Store Building Company be and it is hereby made a party to this proceeding and ordered to set up herein whatever claim or claims, if any, it may have against said Duhme Jewelry Company or its assets now in the hands of said Trustee as aforesaid, and that a writ of subpœna be issued by the Clerk of this Court to said The Mitchell Store Building Company requiring it to answer said petition of said Trustee.

CHARLES T. GREVE,
Referee in Bankruptcy.

Nov. 23, 1910.

8 *Subpœna for The Mitchell Store Building Company.*

Issued Nov. 28, 1910.

THE UNITED STATES OF AMERICA,
The Southern District of Ohio,
Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are hereby commanded to summon The Mitchell Store Building Company, a corporation, citizen of and resident in the State of

Ohio, if it be found in your district, to be and appear in the District Court of the United States for the Western Division of the Southern District of Ohio, aforesaid, at Cincinnati, on the first Monday in February next, to answer a certain Petition filed and exhibited in said Court on November 23rd, 1910, against it by Robert de V. Carroll, Trustee of the Estate of The Herman Keck Manufacturing Company, Bankrupt.

Hereof you are not to fail under the penalty of the law thence ensuing. And have you then and there this writ.

Witness the Honorable Howard C. Hollister, District Judge of the United States, this 28th day of November, A. D. 1910, and in the 135th year of the Independence of the United States of America.

Attest:

[SEAL.] B. E. DILLEY, *Clerk.*

Memorandum.

The said defendant is required to enter its appearance in this suit in the Clerk's Office of said Court on or before the first Monday of January, 1911, otherwise the said Bill may be taken Pro Confesso.

B. E. DILLEY, *Clerk.*

Marshal's Return of Subpœna Issued for The Mitchell Store Building Company.

Filed Nov. 30, 1910.

Received this writ on the 28th day of November, A. D. 1910, and on the 30th day of November, A. D. 1910, I served the within named The Mitchell Store Building Company, a corporation, etc., by delivering a true copy of this writ with the endorsements thereon, to R. H. Mitchell, President of said Company, by handing same to him personally, at Cincinnati, Ohio.

EUGENE L. LEWIS, *Marshal,*
By W. J. SANDERSON, *Deputy.*

Fees:

Copy	$ .30
Mileage	.30
Service	2.00
Total	$2.60

9 *Motion of Robert De V. Carroll, Trustee.*

Filed Dec. 9, 1910.

United States District Court, Southern District of Ohio, Western Division.

No. 4281. In Bankruptcy.

In re THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Motion for a Temporary Injunction.

Robert de V. Carroll, Trustee of the property and assets of The Herman Keck Manufacturing Company, bankrupt herein, moves the Court for an order restraining The Mitchell Store Building Company, until the further order of this Court, from proceeding with or continuing the prosecution of the suit brought by it against the Duhme Jewelry Company set forth in his petition filed herein on November 23, 1910.

MAXWELL & RAMSEY,
Attorneys for Robert de V. Carroll,
Trustee in Bankruptcy.

Affidavit of Robert De V. Carroll, Trustee.

Filed Dec. 9, 1910.

United States District Court, Southern District of Ohio, Western Division.

No. 4281. In Bankruptcy.

In re THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Affidavit of Robert de V. Carroll, Trustee herein, in Support of His Motion for a Temporary Restraining Order, Filed herein on December 9, 1910.

STATE OF OHIO,
County of Hamilton, ss:

Robert de V. Carroll, being sworn, says that he is the duly elected and qualified and acting Trustee of the property and assets of The Herman Keck Manufacturing Company, bankrupt herein; that The Mitchell Store Building Company, a corporation organized and existing under the laws of Ohio, and having its principal office in Cincinnati, Ohio, has applied to the Court of Common Pleas of Hamilton County, Ohio, for a judgment by default or otherwise against The Duhme Jewelry Company in the suit which is now pending in

said Court against said Duhme Jewelry Company, the nature of said suit being fully set forth in his petition filed herein on November 23, 1910, and that said Company threatens to and will unless enjoined by this Honorable Court proceed with the prosecution of said suit and obtain such a judgment therein against said Duhme Jewelry Company.

Affiant believes that the purpose of said Mitchell Store Building Company in obtaining such a judgment is to file same with the Referee in Bankruptcy herein as a preferred claim or lien upon the assets of said Duhme Jewelry Company now in his hands as Trustee in Bankruptcy of The Herman Keck Manufacturing Company.

Further affiant saith not.

ROBERT DE V. CARROLL.

Sworn to before me and subscribed in my presence this 9th day of December, 1910.

JOSEPH L. LACKNER,
Notary Public, Hamilton County, Ohio.

Application for the Appointment of a Receiver for The Duhme Jewelry Company.

Filed Feb. 8, 1909.

United States District Court, Southern District of Ohio, Western Division.

In the Matter of the Application to Have THE HERMAN KECK MANUFACTURING COMPANY Adjudged an Involuntary Bankrupt.

Application for Appointment of Receiver.

To the Honorable the Judges of the District Court of the United States, Southern District of Ohio, Western Division:

The petition of Albert Lorsch and Alfred Krower, composing the firm of Albert Lorsch & Company in the City of New York and State of New York; Julius S. Oppenheimer, Henry S. Oppenheimer, August Oppenheimer, George A. Oppenheimer, Berthold Sinauer, Otto Sinauer and Gustav F. Veith, composing the firm of Oppenheimer Bros. & Veith of the City of New York and State of New York, and Alvin Strassburger and Solomon Kaiser, composing the firm of Louis Strassburger's Son & Co. of the City of New York and State of New York, respectfully shows to this Honorable Court and alleges:

That the firm of Albert Lorsch & Co. has a provable claim against said alleged bankrupt in the sum of $13,645.79; that said firm of Oppenheimer Bros. & Veith has a provable claim against said alleged bankrupt in the sum of $17,263.33; and that said firm of Louis

Strassburger's Son & Co. has a provable claim against said alleged bankrupt in the sum of $7,941.29.

That heretofore on the 8th day of February, 1909, a petition praying that The Herman Keck Manufacturing Company be adjudged an involuntary bankrupt was filed in the office of the Clerk of this Court.

That the said The Herman Keck Manufacturing Company is a corporation organized under the laws of the State of Ohio for the purpose of manufacturing jewelry, with a capital stock of $451,-
300.00 divided into 4,513 shares of $100.00 each; that said
11 Keck Company is engaged in the wholesale business of buying and selling precious stones and jewelry in the City of Cincinnati and State of Ohio.

That the Board of Directors of said Company consists of the following named persons, to-wit, Oscar Keck, Amanda Keck, Emma Keck, Clara G. Keck and Bruno Fera.

That said Oscar Keck is the President of said Company and has sole control of the property, management and affairs thereof.

Your petitioners allege that The Duhme Jewelry Company is a corporation organized under the laws of the State of Ohio with a capital stock of $245,000, consisting of 490 shares of a face value of $500.00 each.

That all of the capital stock of said Duhme Jewelry Company is owned and held by the said The Herman Keck Manufacturing Company and that the Board of Directors of said Duhme Jewelry Company consists of the same persons and officers as are directors and officers of The Herman Keck Manufacturing Company, to-wit, Oscar Keck, Amanda Keck, Emma Keck, Clara G. Keck and Bruno Fera; and that each of said directors has standing in his or her name one share of stock of said Duhme Company as trustee of the Herman Keck Manufacturing Company, and that the stock is in the name of each of said persons for the sole purpose of qualifying him or her as director of the Duhme Jewelry Company.

That said Oscar Keck is the alleged President of said The Duhme Jewelry Company, and is now and has been for some time past in the sole control of the property, management and affairs of said Duhme Jewelry Company.

That all the funds for the organization and transaction of the business of The Duhme Jewelry Company were furnished, as recorded in the minutes of said company, by the Herman Keck Manufacturing Company, and that there is due to the Herman Keck Manufacturing Company from the Duhme Jewelry Company the sum of $56,625.77 for money loaned by said Keck Company to said Duhme Company for aforesaid purpose.

That said Duhme Jewelry Company is engaged in the business of buying, selling and dealing at retail in precious stones, jewelry, silverware, statuary and bric-a-brac.

That said Herman Keck Manufacturing Company and Duhme Jewelry Company occupy the same premises in the City of Cincinnati, and State of Ohio and that the books of account and finances

of both of said companies are in charge of the same bookkeeper and office management.

12 That said Duhme Jewelry Company is a subsidiary company to said Herman Keck Manufacturing Company and is in fact a mere department and adjunct to said Keck Manufacturing Company, and is now and has been ever since its organization the agency and instrumentality for selling at retail many of the precious stones and much of the jewelry of said Herman Keck Manufacturing Company. That a large amount of the precious stones and jewelry of the Herman Keck Manufacturing Company has been consigned for sale by said Company to said Duhme Jewelry Company and is now mingled with the precious stones and jewelry belonging to the Duhme Company, and which precious stones and jewelry so consigned as aforesaid and mingled with the property of the Duhme Jewelry Company belongs to and is the property of the bankrupt estate of said Herman Keck Manufacturing Company.

That the precious stones and jewelry of the Herman Keck Manufacturing Company so mingled as aforesaid as well as the precious stones and jewelry belonging to the Duhme Company are very small, occupy a very small amount of space and can easily be carried about one's person and disposed of.

Your petitioners allege that said Herman Keck Manufacturing Company and Duhme Jewelry Company are in fact one and the same concern and that the property, management and affairs of both companies are under the sole control of Oscar Keck. That said Oscar Keck is wholly incompetent and unfit to control the affairs of said Company, that though in the city he is frequently absent for days at a time from the place of business of said Companies and that while so absent, all the assets of said company are in charge and under the control of the clerks and salesmen. That the precious stones, jewelry and valuable assets of the Duhme Jewelry Company are placed in iron safes at night, of which safes certain employes know the combination and to which they have access at all times.

That the assets of the Duhme Jewelry Company may be diverted or lost or their value depreciated to the injury of the creditors of the alleged bankrupt.

Your petitioners further allege that there are creditors of the Duhme Jewelry Company who may have a first equity in the assets of said Company for the payment of their respective claims but that the value of the assets of said company is largely in excess of the claims of the creditors of said Duhme Company and that the surplus after said claims are paid belongs to and is the property

13 of the Herman Keck Manufacturing Company and of the estate of the alleged bankrupt herein, inasmuch as said Keck Manufacturing Company is the sole owner of the capital stock of said Duhme Jewelry Company.

Your petitioners believe that if the merchandise property of the Duhme Jewelry Company, with which there is mingled much of the valuable property of the Herman Keck Manufacturing Company, is allowed to remain under the control of said Oscar Keck and disposed of by him, it will be impossible to identify the property of

the Herman Keck Manufacturing Company from that of the Duhme Company, that the property of said Herman Keck Manufacturing Company and Duhme Jewelry Company may be diverted, lost or wasted to the injury of the creditors of said The Herman Keck Manufacturing Company.

Your petitioners believe that for each and all of the foregoing reasons it is absolutely necessary and essential for the protection of the creditors of the Herman Keck Manufacturing Company and the preservation of the estate of the Herman Keck Manufacturing Company in bankruptcy that a receiver be appointed to take charge of the assets and the property of the Duhme Jewelry Company.

Wherefore your petitioners pray that the receiver appointed for the alleged bankrupt herein, be likewise appointed to take charge of all the assets and property of The Duhme Jewelry Company and hold the same subject to the further orders of this court; and, that The Duhme Jewelry Company and each and all of its officers, managers and employés be restrained from interfering with said receiver in his possession and in his taking possession of the property and assets of the said The Duhme Jewelry Company.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

Jonas B. Frenkel, being duly sworn says that he is one of the attorneys of the three petitioners above named, and he hereby makes solemn oath that the statement- contained in the foregoing petition are true. He further states under oath that the reason why said petition is not subscribed and sworn to by said petitioners is because they are each residents and citizens of the City of New York and State of New York and are absent from said Southern District of Ohio, and that they have each authorized him to subscribe and verify said petition.

JONES B. FRENKEL.

Sworn to and subscribed before me this 6th day of February, 1909.

[SEAL.]

GEO. H. KATTENHORN,
Notary Public, Hamilton County.

14

40 cts. due Notary.

Order Appointing Receiver for the Duhme Jewelry Company.

Entered Feb. 8, 1909.

In the United States District Court, Southern District of Ohio, Western Division.

In the Matter of the Application to Have THE HERMAN KECK MANUFACTURING COMPANY Adjudged an Involuntary Bankrupt.

Order Appointing Receiver for The Duhme Jewelry Company.

This proceeding came on this day to be heard upon the application of the petitioners, Albert Lorsch & Company, Oppenheimer Bros. & Veith and Louis Strassburger's Son & Company, creditors of The Herman Keck Manufacturing Company, for the appointment of a Receiver to take charge of the property and estate of The Duhme Jewelry Company, and upon the evidence, the Court finds that it is absolutely necessary for the preservation of the estate of said alleged bankrupt, The Herman Keck Manufacturing Company, that a receiver be appointed to take charge of the property and the estate of The Duhme Jewelry Company.

It is therefore considered and ordered by the Court that Robert de V. Carroll be and he is hereby appointed Receiver of the property and estate of said The Duhme Jewelry Company, and he is hereby authorized and directed to take charge and possession of all the property and estate of said The Duhme Jewelry Company, wheresoever situated and safely keep the same subject to the further order of this Court upon said Receiver furnishing bond conditioned according to law in the sum of One hundred and fifty Thousand Dollars, to be approved by the Clerk of this Court.

Thereupon said Robert de V. Carroll appeared in court accepting said appointment and was duly sworn to faithfully discharge his duties in the premises and furnish said bond with The American Bonding Co. of Baltimore, Md., as surety, to the satisfaction and approval of the Clerk of this Court, and the same is filed herewith.

Answer of the Herman Keck Manufacturing Company.

Filed March 25, 1909.

15 In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4281.

In the Matter of THE HERMAN KECK MANUFACTURING CO., Alleged Bankrupt.

Answer of The Herman Keck Manufacturing Company to Petition and Amended Petition of Albert Lorsch et al.

Now comes the Herman Keck Manufacturing Company and admits it is a corporation organized under the laws of Ohio and denies that it is insolvent, as alleged in the petition and Amended Petition of Albert Lorsch and other-, and denies that it did within four months next preceding the date of the filing of the petition herein and the amended petition herein, while insolvent, commit the act of bankruptcy alleged in said Amended petition, to-wit:

Between the 19th day of September, 1908, and the 23d day of September, 1908, conceal with intent to hinder, delay and defraud its creditors, diamonds of the value of Fifty-five Thousand Five Hundred and Fifty-six and 07-100 ($55,556.07) dollars, precious stones and pearls to the value of Twenty-one Thousand Five Hundred ($21,500.00) Dollars and semi-precious stones of the value of Eight Thousand ($8,000.00) Dollars, and denies that it is now concealing said diamonds, precious stones, pearls, and semi-precious stones, or any other assets.

This defendant for further answer says that it denies that within four months next preceding the date of the petition herein, and the date of the amended petition herein, — committed a further act of bankruptcy, in that it did there-fore, to-wit: on the 22d day of December, 1908, while insolvent, transfer a portion of its property, to-wit: Three Hundred ($300.00) Dollars in money, or any other sum to Oscar Keck, one of its creditors with intent to prefer said creditor over its other creditors. This defendant alleges that the said Oscar Keck was an employee of The Herman Keck Manufacturing Company and that as such employee he received on account of his wages Three Hundred ($300.00) Dollars, and that The Herman Keck Mfg. Company was solvent at that time, and is still solvent, and that that payment was not a preference within the meaning of the bankruptcy act.

This defendant company further says that on the — day of May, 1907, the Board of Directors of The Duhme Jewelry Company a corporation organized under the laws of Ohio passed a resolution to transfer all of its capital stock to The Herman Keck Manufacturing Company, and that said proposition was submitted to the stock-

holders of The Duhme Jewelry Company and ratified and
16 thereupon said capital stock was transferred to The Herman Keck Manufacturing Company and became part of the assets of said The Herman Keck Manufacturing Company.

This defendant for further answer says that on the 2d day of October, 1908, all the capital stock, to-wit: four hundred and eighty-five (485) shares at a par value of Five Hundred ($500.00) Dollars per share, of The Duhme Jewelry Company, a corporation organized under the laws of Ohio, was assigned, transferred and delivered to a Creditors' Committee, consisting of Henry S. Oppenheimer, Albert Krower, Adolph Ludeke, Lazarus P. Kadison, as collateral security for their debts, and that said stock of The Duhme Jewelry Company is still in possession of said trustees, and that by reason of the collateral security thus held, these petitioning creditors had no legal capacity to bring this action.

This defendant further answering says that on October 2, 1908, it turned over all of its assets, including the assets of The Duhme Jewelry Company to a committee selected by the creditors, who had full charge of the affairs of both The Herman Keck Mfg. Company and The Duhme Jewelry Company; that a copy of said agreement is hereto attached and made a part hereof: that said committee conducted the affairs of both companies until the evening of February 6th at which time they notified Mr. Oscar Keck that they would terminate the agreement, and without further notice instituted these proceedings, and that by reason of their being in possession and having charge and full control of both companies, that they knew that the charges made in this petition were without foundation, and that they knew that The Duhme Jewelry Company was solvent, and that none of the acts of bankruptcy alleged to have been committed were committed, and could not have been committed without the consent of the Creditors' Committee, and that these proceedings were not filed in good faith, but were filed maliciously and for the purpose of ruining the commercial standing of both companies.

Wherefore this defendant prays that this matter may be inquired into by the Court, and that it should not be declared a bankrupt for any causes in said petition and amended petition, or for any other causes, and that these proceedings be dismissed and that it be restored to its property, and for all other and proper relief.

HOFFMAN-BODE & LEBLOND,
Attorneys for Alleged Bankrupt.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Personally appeared before me the undersigned Notary Public in and for Hamilton County, Ohio, Oscar Keck, President of
17 The Herman Keck Manufacturing Company, a corporation organized under the laws of Ohio, defendant herein, — make solemn oath that the allegations contained in the foregoing answer are true.

OSCAR KECK.

Sworn to and subscribed before me this 25th day of March, 1909.

E. S. MORRISSEY,
Notary Public, Hamilton County, Ohio.

Agreement made and entered into this 2d day of October, 1908, between The Herman Keck Manufacturing Company hereinafter called the Keck Company, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, engaged in the business of dealing in diamonds at wholesale in the City of Cincinnati, State of Ohio, and The Duhme Jewelry Company, hereinafter called The Duhme Company, a corporation duly organized under and by virtue of the laws of the State of Ohio, and engaged in the business of dealing in diamonds and jewelry at retail, and Henry S. Oppenheimer, Alfred Krower, Adolph Ludeke and Lazarus P. Kadison, hereinafter called the Committee, witnesseth:

Whereas, the Keck Company is indebted to the individuals, firms and corporations named in the Schedule marked Schedule "A" and annexed hereto and required an extension of time to meet its obligations; and

Whereas, the Duhme Company is indebted to sundry creditors, and requires an extension of time to meet its obligations, and

Whereas, The Keck Company and the Duhme Company desire to procure their respective creditors, or the representatives of the said creditors, an extension of time for the payment of said indebtedness; and,

Whereas, the Duhme Jewelry Company is dependent for a continuation of its business existence upon the Keck Company obtaining an extension of time for the payment of its debts from its creditors, and it is to the interest and benefit of said Duhme Company that said Keck Company be relieved of its present financial embarrassment; and,

Whereas, the Keck Company owns all the issued capital stock of the Duhme Company, one share thereof being in the name of each of the following, to-wit: Oscar Keck, Trustee, Clara G. Keck, Trustee, Emma Keck, Trustee and Amanda Keck, Trustee, and four hundred and eighty-six shares in the name of The Herman Keck Mfg. Co., one share whereof is to be transferred to the name of Bruno Fera, Trustee; and,

18 Whereas, two of said creditors of the Keck Company, to-wit: Fera & Kadison and L. & M. Kahn & Co., hold the endorsement of the Duhme Company amounting respectively to $22,378.15 and $9,364.41; and,

Whereas, all of the creditors whose names appear in the schedule annexed hereto and marked "A" have nominated and appointed and do hereby nominate and appoint Henry S. Oppenheimer, Alfred Krower, Adolph Ludeke and Lazarus P. Kadison as a Committee to represent and act for said creditors in and about the premises, and in and about the execution of this agreement;

Now, therefore, in consideration of the premises and of the sum of One Dollar ($1.00) by the Committee to the Keck Company paid,

the receipt whereof is hereby acknowledged and in further consideration of the sum of One Dollar ($1.00) by the Committee to the Duhme Company paid, the rec-ipt whereof is hereby acknowledged, and in further consideration of the mutual covenants and agreements hereinafter contained, the parties hereto hereby agree and covenant with each other as follows:

First. All the parties hereto severally acknowledge and accept as correct the several amounts of indebtedness as set forth in Schedule "A" hereto annexed and acknowledge that the same are valid obligations due by said Keck Company.

Second. The parties hereto agree upon the following plan of liquidating and paying the obligations and indebtedness of the Keck Company and the Duhme Company including the obligations of the Duhme Company to Fera & Kadison and L. & M. Kahn & Co., aforesaid on the endorsement of the Duhme Company.

(*a.*) The Stockholders of the Keck Company and the Duhme Company shall maintain as a part of their respective Codes of Regulations provisions that all moneys shall be deposited in bank to be drawn out only upon the joint signature of the President and Secretary of the respective companies, or the signature of the two Vice Presidents and the Secretary of the respective companies, and that all checks and commercial paper shall be subject to like joint signatures, and that Bruno Fera hereinafter for brevity called Fera or any successor or successors of him named by said Companies or either of them; and said Fera or Board of Directors of each of said companies *and* shall be selected as Secretary of each of said companies, and as the representative of the Committee. Said Fera or his successor shall at all times have access to all the books of account and all other records and all the merchandise of every kind and description of the Keck Company and the Duhme
19 Company and bills receivable, commercial paper and any and all obligations due said Companies or owned by said Companies or either of them; and said Fera or his successors shall receive as compensation for his services the sum of One Hundred and Fifty ($150.00) Dollars per month, one-half thereof payable from each of said Companies and payable on the 1st and 15th of each month during his term of service beginning with October 1, 1908, and in addition to aforesaid compensation said Fera shall receive his traveling expenses from and to the City of New York amounting to the sum of One Hundred ($100.00) Dollars.

(*b.*) The Keck Company or the Duhme Company shall incur no indebtedness or obligations beyond the usual and incidental expenses of both businesses, except upon and with the consent of said Fera or his successor. No indebtedness for the purchase of merchandise shall be incurred by either of said Companies until all their present indebtedness including those hereinafter set forth shall have been paid, except with the express written consent of said Fera or his successor.

(*c.*) Any and all funds or moneys received by the Duhme Company from any and all sources whatsoever shall be disposed as follows:

(1.) To the payment of the current running expenses of the Duhme Company and the sums to be paid as provided in Paragraph "F."

(2.) On account of the indebtedness of the Duhme Company to the Keck Company, to pay over to the Keck Company so much as may be necessary to meet its current expenses including past due wages. Provided said Keck Company has no other funds from any other source to meet the same, and provided further that upon the payment by the said Duhme Company to said Keck Company of said moneys, said Keck Company shall strictly apply the same to the purpose for which said funds are paid to the Keck Company by said Duhme Company.

(3.) After payment of the current running expenses of the Duhme Company, including past due wages, all moneys received by the Duhme Company shall be deposited in the Western German Bank under a special account in the names of Edward F. Weil, Louis Luebbert and Jonas B. Frenkel, as Trustee for Duhme Company, which moneys shall bear three per cent interest per annum and shall be held on deposit until the amount of notes of the Keck Company held under discount by the Western German Bank shall have been reduced to $10,000.00, when the moneys so deposited as aforesaid shall be distributed in the following order:

First. To the Merchandise creditors of the Duhme Company amounting in the aggregate to about $35,000.00.

Second. To the obligations of the Duhme Company due to Fera & Kadison and L. & M. Kahn & Co., together with interest at six per cent per annum, on the endorsement of said Duhme Company above referred to, unless the promissory notes bearing said endorsement shall have been sooner paid by the makers thereof, in which event, only that portion remaining unpaid shall be paid from the funds of the Duhme Company.

Third. To aforesaid Committee so much as remains after payment of aforesaid amounts for distribution among the creditors of said Keck Company in proportion to the amount of their respective claims.

(*d.*) Any and all funds or moneys received by the Keck Company from any and all sources whatsoever shall be disposed of as follows:

First. To the payment of its current running expenses including past due wages, and the sums to be paid as provided in paragraph "F."

Second. To the obligations of the Keck Company endorsed by the Duhme Company due to Fera & Kadison and L. & M. Kahn & Co., together with six per cent interest thereon as aforesaid unless the promissory notes bearing said endorsement shall have been sooner paid out of moneys from the Duhme Company as hereinbefore provided. After payment of aforesaid amount out of moneys received from the Keck Company, all other moneys received by the Keck Company shall be deposited with the Western German Bank under a special account in the names of Edward F. Weil, Louis Luebbert and Jonas B. Frenkel, as Trustees for Keck Company

which moneys shall bear three per cent interest per annum and shall be held on deposit until the amount of notes of the Keck Company held under discount by the Western German Bank shall have been reduced to $10,000.00 when the moneys so deposited shall be paid to and distributed by said Committee among the creditors of the Keck Company in proportion to the amount of their respective claims.

(e.) The total amount to be expended in salaries by the Keck Company and by the Duhme Company shall at no time within the period covered by this agreement exceed the sum of $350.00 per month from the Keck Company and a reasonable sum per month for the Duhme Company, excepting therefrom the salary to be paid to said Fera or his successor.

(f.) It is an express condition of this contract that during the period thereof that Oscar Keck shall draw no dividend of
21 any kind whatsoever, whether heretofore declared or hereafter declared and that Emma Keck shall draw not to exceed one hundred ($100.00) dollars per month dividends and Amanda Keck shall draw not to exceed one hundred ($100.00) dollars per month in dividends, up to but not beyond the balance now credited to each of them, and that Clara G. Keck may be advanced the sum of two hundred ($200.00) dollars on account of her dividends now credited to her and in addition thereto may draw two hundred ($200.00) dollars per month on account of dividends heretofore credited to her, providing the amounts so paid shall in no event exceed the amount of dividends now credited to her.

(g.) There shall be a monthly audit of the books of said Duhme Company— said Keck Company by a competent accountant, who shall be agreeable to said Fera, who after said date shall make a monthly detailed statement of the affairs of each Company, said detailed statement to be submitted not later than the 15th of each and every month.

(h.) The Keck Company agrees upon execution and delivery of this agreement to transfer as collateral security for the payment of the indebtedness set forth in Schedule "A" herein, to the Committee by endorsement thereon four hundred and eighty-five shares (485) of the capital stock of The Duhme Jewelry Company, said stock being at a par value of — ($500.00) dollars per share, now held and owned by the Keck Company.

(i.) It is further expressly understood and agreed that in the event and if at any time during the continuance of this agreement the said Committee or a majority thereof, determine or deem it for the best interest and welfare of the creditors represented by them, they may, without notice to any of the parties herein, terminate this agreement, in which event said extension granted herein shall be of no further force and effect, anything herein contained to the contrary notwithstanding, and said indebtedness due the creditors then unpaid shall immediately be due and payable.

(j.) It is further understood and agreed that this agreement shall terminate and be of no effect upon the payment of all indebtedness due the creditors as set out in Schedule "A" herein, and upon the

termination of this agreement then that said Bruno Fera will at the request of the Board of Directors of said Companies, resign as Director and as Secretary, and his salary shall thereupon cease and terminate.

(*k.*) It is further agreed that said Keck Company and said Duhme Company shall also pay in equal portions all the expenses of the said Committee together with any and all legal ex-
22 penses heretofore, now, or hereafter incurred by said Committee or otherwise in and about the subject matter of this agreement.

In consideration of the agreements aforesaid, the said Committee of creditors whose names are set forth in Schedule "A" hereto annexed, hereby agree to extend the time for the payment of the amounts due said creditors and each of them until such time as the Committee shall continue this agreement, but no longer than one year from the date of the execution of this agreement.

In witness whereof, The Herman Keck Manufacturing Company and The Duhme Jewelry Company pursuant to resolution duly adopted by their respective stockholders and directors, have caused these presents to be signed by their duly authorized officers and the other parties hereto have set their hands and seals the day and year first above written.

THE DUHME JEWELRY CO.
OSCAR KECK, *Pres't.*
THE H. KECK MFG. CO.
OSCAR KECK, *Pres't.*
AMANDA KECK, *Secretary.*

In the presence of:

——— ———.

SCHEDULE "A."

Albert Lorsch & Co.	13,645.79
Ludeke & Heiser	34,450.79
Edouard Van Dam	6,020.16
Oppenheimer Bros., & Veith	17,263.33
Fera & Kadison	22,378.15
Stern Bros., & Co.	2,386.21
Van Antwerpen, Van Dan Bosch & Co.	11,569.00
Louis Strasburger's Sons & Co.	7,860.62
L. & M. Kahn & Co.	9,346.41
Arnstein Bros. & Co.	7,770.62
Backus & Straus (London, Eng.)	22,013.10

FEBRUARY 6TH, 1909.

The Duhme Jewelry Company, No. 23 W. Fourth St., City.

GENTLEMEN: As attorney for and under the directions of Henry S. Oppenheimer, H. Fera, Adolph Ludeke and Alfred Krower, representing the creditors of The Herman Keck Manufacturing Company, I herewith give you notice that aforesaid parties representing the creditors of The Herman Keck Manufacturing Company deem

it for the best interests and welfare of the creditors represented by them to terminate the agreement entered into between them
23 as a Committee for the creditors of The Herman Keck Manufacturing Company and the said Herman Keck Manufacturing Company and the Duhme Jewelry Company on the 2d day of October, 1908, and do terminate the same and hereby notify you that all the provisions thereof have no further force or effect.

Respectfully yours,

JONAS B. FRENKEL,
Attorney for Henry S. Oppenheimer, H. Fera, Adolph Ludeke, Alfred Krower, Committee.

Amended Answer of The Herman Keck Manufacturing Co.

Filed Nov. 9, 1909.

In the District Court of the United States for the Southern District of Ohio, Western Division.

No. 4281.

In the Matter of THE HERMAN KECK MANUFACTURING COMPANY. Alleged Bankrupt.

Amended Answer of The Herman Keck Manufacturing Company.

Now comes the Herman Keck Manufacturing Company admits it is a corporation organized under the laws of the state of Ohio, and denies that it is insolvent, as alleged in the petition and amended petition of Albert Lorsch and others, and states that it was solvent on February 8th, 1909 and at all times prior thereto, and denies that it did within four months next preceding the date of the filing of the petition herein and the amended petition herein, or at any other time, commit any acts of bankruptcy alleged in said petition or amended petition, to-wit:

Between the 19th day of September 1909 and the 23rd day of September, 1908 or between the 23rd of September and the 29th of September, 1908, or any other time, conceal with intent to hinder delay and defraud its creditors, diamonds of the value of fifty-five Thousand Five Hundred and fifty-six and 07-100 ($55,556.07) dollars, Precious stones and pearls to the value of Twenty-one Thousand Five Hundred ($21,500.00) Dollars and Semi-Precious Stones of the value of Eight Thousand ($8,000.00) Dollars or any other assets, and denies that it is now concealing said Diamonds, Precious Stones, Pearls and Semi-Precious Stones, or any other assets.

This defendant for further answer says that it denies that within four months next preceding the date of the petition herein, and the date of the amended petition herein, — committed a further act of bankruptcy in that it did there-fore to-wit: on the 22nd day
24 of December, 1908, transfer a portion of its property, to-wit: Three Hundred ($300.00) Dollars in money or any other

sum to Oscar Keck one of its creditors, with intent to prefer said creditor over its other creditors. This defendant alleges that the said Oscar Keck was an employee of the Herman Keck Manufacturing Company and that as such employee he received on account of his wages Three Hundred ($300.00) Dollars, and that The Herman Keck Mfg. Company was solvent at that time, and is still solvent, and that that payment was not a preference within the meaning of the Bankruptcy Act, and said Company was not insolvent at the time of said payment or at any other time.

This defendant company further says that on the — day of April 1907 the Board of Directors of The Duhme Jewelry Company, a corporation organized under the laws of Ohio, passed their resolutions to transfer all of its capital stock and assets to The Herman Keck Manufacturing Company and that said proposition was submitted to the stockholders of The Duhme Jewelry Company and The Herman Keck Manufacturing Company and ratified and thereupon said capital stock and assets were transferred to The Herman Keck Manufacturing Company and became and ever since have been a part of the assets of said The Herman Keck Manufacturing Company.

This defendant for further answer says that on the 2nd day of October 1906 all the capital stock to-wit: four hundred and eighty-five (485) shares at a par value of Five Hundred ($500.) Dollars per share, of The Duhme Jewelry Company, a corporation organized under the laws of Ohio was assigned, transferred and delivered to a Creditors' Committee consisting of Henry S. Oppenheimer, Albert Krower, Adolph Ludeke, Lazarus P. Kadison, representing among others the petitioning creditors, as collateral security for their debts, which was ample security for said debts and that said stock of The Duhme Jewelry Company was in possession of said Committee on February 8, 1909 when said petition was filed, and that by reason of the collateral security thus held, these petitioning creditors had no legal capacity to bring this action. This defendant further answering says that on October 2, 1908 it turned over all of its assets, including the assets of The Duhme Jewelry Company, to a committee selected by only the New York creditors of whom the petitioners were a part who from said date had full charge of the business and affairs of both The Herman Keck Mfg. Company and The Duhme Jewelry Company; that a copy of said agreement is hereto attached and made a part hereof; that said Committee conducted the business and affairs of both companies until the 8th day of February,
25 1909 at which time they notified Mr. Oscar Keck that they would terminate the agreement and without further notice on said date instituted these proceedings; that they knew that the charges made in this petition were without foundation and that they did not have any right under the Bankruptcy Act to file this petition, and that they knew that The Herman Keck Manufacturing Company and its retail department known as The Duhme Jewelry Company was solvent and that no acts of Bankruptcy as alleged to have been committed in said petition or amended petition, or otherwise were committed and could not have been committed without the

knowledge and consent of the Creditor's Committee, and that these proceedings were not filed in good faith, but were filed maliciously and for the purpose of ruining the commercial standing of both of said Companies. Wherefore this defendant prays that this matter may be inquired of by the Court, and that it should not be declared a bankrupt for any causes in said petition and amended petition or for any other causes, and that these proceedings be dismissed and that it be restored to its property, and for all other and proper relief.

HOFFMAN-BODE & LE BLOND,
Attorneys for The Herman Keck Mfg. Co.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Personally appeared before me the undersigned Notary Public in and for Hamilton County, Ohio, The Herman Keck Manufacturing Company, a corporation organized under the Laws of the State of Ohio, by Oscar Keck, its President, defendant herein, make solemn oath that the allegations contained in the foregoing amended answer are true.

OSCAR KECK.

Sworn to and subscribed before me this 20th day of September 1909.

AUGUST BODE, Jr.,
Notary Public, Hamilton County, Ohio.

Order Adjudicating The Herman Keck Manufacturing Co. Bankrupt.

Entered Dec. 3, 1909.

UNITED STATES DISTRICT COURT,
Southern District of Ohio, Western Division:

No. 4281.

In the Matter of the Application to Have THE HERMAN KECK MANUFACTURING COMPANY Adjudged an Involuntary Bankrupt.

26 *Adjudication of Bankruptcy.*

At Cincinnati, in said District, on the 3rd Day of December, A. D. 1909, Before the Honorable Albert C. Thompson, Judge of the Southern District of Ohio.

This cause came on to be heard at Cincinnati upon the petition and amended petition of Albert Lorsch and Alfred Krower, composing the firm of Albert Lorsch & Company, Julius S. Oppenheimer, Henry S. Oppenheimer, August Oppenheimer, George A. Oppenheimer, Berthold Sinauer, Otto Sinauer and Gustav F. Veith, com-

posing the firm of Oppenheimer Bros. & Veith, and Alvin Strassburger and Solomon Kaiser composing the firm of Louis Strassburger's Son & Company, that The Herman Keck Manufacturing Company of Cincinnati, Ohio, a corporation organized and existing under the laws of the State of Ohio, be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, and upon the answer of said respondent company, and upon the evidence, and was submitted to the Court.

And thereupon, and upon consideration of the proofs in said cause, and the arguments of counsel thereon, the Court finds that at and before the filing of the said petition and Amended petition, the said respondent The Herman Keck Manufacturing Company was and is now wholly insolvent; and, being so insolvent and before and during the four months next preceding the filing of said petition and of the amended petition, concealed with intent to hinder, delay and defraud its creditors, certain diamonds and other precious stones of great value, and has ever since concealed and still continues to conceal the same for said purpose, as alleged in the said petition and amended petition, and the said respondent The Herman Keck Manufacturing Company is hereby declared and adjudged bankrupt accordingly.

And now comes said respondent The Herman Keck Manufacturing Company by its counsel and excepts to all the above and foregoing, and gives notice of its intention to appeal this cause to the Circuit Court of Appeals.

As to the alleged act of bankruptcy set up in the petition of Siegfried Strauss and others filed herein March 8, 1909, and the alleged preferential payment of $300 to Oscar Keck set up in the said petition and amended petition of Albert Lorsch and others, the Court finds the same are not supported by the evidence, and the Court therefore finds in favor of respondent and against said petitioners in this behalf and dismisses the said petitions and amended petition as to these alleged acts of bankruptcy.

27 It further appearing to the Court that no leave of Court was obtained to file the alleged amended answer of the respondent herein on September 20, 1909, and that the same adds nothing material to the original answer, it is hereby stricken from the files, to which respondent by its counsel excepts.

Opinion of Judge Sater.

Filed May 26, 1910.

In the District Court of the United States, Southern District of Ohio, Western Division.

No. 4281.

ALBERT LORSCH and ALFRED KROWER, Composing the Firm of Albert Lorsch & Company et al., Plaintiffs,

vs.

THE HERMAN KECK MANUFACTURING COMPANY, Defendant.

Mem. on Application to Surrender Duhme Jewelry Company Property to the Trustee.

SATER, *District Judge:*

The purchase price of the property acquired by the Duhme Jewelry Company when it began business, excepting $5,000, was paid by The Herman Keck Manufacturing Company. Subsequently its funds were used to acquire that outstanding interest. The records of the directors' meetings of both companies, of May 29, 1902, show that there was due the Keck Company at that time from the Duhme Company $89,500. None but the Keck family were then interested as owners in either of the companies. Whether the Duhme Company repaid the purchase price of its property to the Keck Company is not an important or a controlling factor in the determination of the question here presented.

Herman Keck died December 20, 1906. His widow, Clara, was appointed and qualified as his administratrix. Down to that date he and Oscar Keck were the active managers of both companies. Thereafter the management was with Oscar alone until the Receiver took possession, his powers, however, being limited during the life of the creditors' committee. Amanda, Emma and Clara at all times acquiesced in and consented to the management. Oscar, whose position as manager enables him to speak intelligently upon the subject, testified that the two companies were virtually one; that the two were "only distinguished in name for the sake of retail and wholesale distinction;" that some of the Keck Company goods were upstairs and some were downstairs with those of the Duhme
28 Company, in the jointly occupied building; that the stock of the two companies was almost inseparably commingled; that the machinery of the two companies was also intermingled in the different parts of the building; that it was all considered Keck Company machinery; that the Keck Company was the sole owner of the business of the Duhme Company; and that the money paid by the Keck Company for the property with which the Duhme Company began business was never repaid.

At the time of the death of Herman Keck, the Keck Company's

bank liabilities were about $300,000.00. The two companies had neglected to inventory and appraise their respective assets. The absence of systematic bookkeeping was such that a determination of the exact status of the respective companies was practically impossible. A re-adjustment of the affairs of the companies which would more effectually make the Duhme Company an asset of the Keck Company, as a basis of credit, was undertaken. The active participants in formulating the plan of procedure were Jones & James, who had long been attorneys for both companies, Clara Keck as administratrix, Oscar Keck, representing himself, and his two sisters, Weil, Kleybolte and Kennedy. Emma and Amanda, however, individually made some investigation as to such plan. It does not appear that they interposed any objection to it. Clara thought the two companies should be kept separate. Mr. James possessed such knowledge of the status of the companies as came from long service as their attorney and from expressions of views given by the active managers. A tentative plan of adjusting the relations of the companies and of the stockholders seems to have been prepared and discarded. I have concluded to admit the typewritten copy of it in evidence for what it is worth, although I excluded it at the hearing, and although the evidence is not very satisfactory as to its preparation or the use made of it. Finally, all the members of the Keck family acquiesced in, assented to, and actively participated in the adoption of the plan of adjustment which is fully set forth in the minutes of the several meetings held by the stockholders and directors of the two corporations on June 1, 1907, whereby the Keck Company took in its own name the issued shares of stock of the Duhme Company. It is true, enough of the shares were held in the names of individuals to constitute a board of directors of the Duhme Company, but this was a mere convenience. The committee's report which formed the basis of the action of the stockholders and
29 directors of the respective companies on June 1, 1907, among other things, recites:

"(1) All funds for the organization and transaction of the business of the Duhme Jewelry Co. were furnished by The Herman Keck Manufacturing Co. The Duhme Jewelry Co. was in fact owned by and was merely a department of The Herman Keck Manufacturing Company, although the shares of stock of The Duhme Jewelry Co. were placed in the individual names of the stockholders of The Herman Keck Manufacturing Co. This is true not only of the original issue of stock but also of the stock purchased from the Duhme's. This is also true as to the issue of stock provided for in the resolution of The Board of Directors of The Duhme Jewelry Co. of May 29th, 1902, which is also referred to in the minutes of The Board of Directors of The Herman Keck Manufacturing Co. of May 29th, 1902.

"(2) The five shares of stock of The Western German Bank, and the twenty-five shares of stock of The Cincinnati Realty Co. in the name of Oscar Keck, and the fifteen shares of stock of The Western German Bank, and the twenty-five shares of stock in The Cincinnati Realty Co., in the name of Herman Keck, are all of them the

property of The Herman Keck Manufacturing Co. and paid for with its funds."

The adjustment made was to become operative as of January 1, 1907. On May 31, a report was given to a mercantile agency which showed the Keck Company to own stock to the amount of $245.00. This was the Duhme Company stock. The plan of adjustment to which all gave assent was adopted for two reasons; because, first, the Duhme Company was a mere department of the Keck Company, and, second, if the Duhme Company should be shown as an asset of the Keck Company, which felt the need of a larger capital, the latter company would have a better credit margin for carrying on its business. Subsequent to June 1, the several stockholders and directors of each of the companies met on different occasions, and, acting under the newly adopted plan, each voted as a stockholder or director, as the case might be. On May 2, 1908, the directors of the Keck Company met, all the members of the family being present, received a report from the accountant, which was unanimously adopted, and in conformity with his suggestion, to correct an error previously made in the issue of stock, reduced their stock holdings in the company, as fixed by, but still in recognition of, the plan adopted June 1, 1907. As directors they also voted a five per cent dividend.

On October 2, 1908, the stockholders of the Keck Company, to obtain an extension of time for the payment of indebtedness, authorized the execution and delivery of a contract to a creditors' committee, which, among other things, recites that the Keck Company then owned all the issued capital stock of the Duhme Company, that Oscar, Clara, Emma and Amanda each held one share as trustee, that four hundred and eighty-eight shares stood in the name of the Keck Company, and that one share was to be transferred to Fera as trustee. At the same time like action was taken by both the stockholders and directors of the Duhme Company. Clara Keck was excused from voting at the meetings held on that date.

Clara Keck did not, either as administratrix or as an individual, take any exception to the inventory and appraisement reported by the appraisers of her husband's estate on May 29, 1907, which states that the stock of the Duhme Company which stood in the name of Herman Keck, was the property of the Keck Company and was held by her in trust for it, and that by appropriate order she should be authorized to transfer it to such company. On the contrary, she made oath that the inventory and appraisement was in all respects just and true, and filed it in the Probate Court. She was not charged with the value of such stock. The inventory and appraisement, as verified and filed, shows that the two hundred and eighty-three shares of the Duhme Company stock standing in her husband's name, in consequence of a dividend about to be declared, would be increased to eighteen hundred and forty-eight and one-half shares. This dividend was to be made in pursuance of the adjustment then pending and finally adopted June 1, 1907. As administratrix she petitioned for and obtained authority from that court

to participate in that adjustment, and later, by like authority, she joined, while represented by distinguished counsel in reducing the stock holdings of the estate in the Keck Company to correct the error which the accountant found had been made in the issue resulting from the action taken on June 1, 1907. She, Emma and Amanda all received payments of monthly allowances from the Company after the plan of reorganization had been perfected.

Both the original and the amended answer filed by the Keck Company in the bankruptcy proceedings more than once allege that company's ownership of the stock of the Duhme Company.

Other pertinent facts appearing upon the report will not be recited. Not until after the Keck Company had been adjudicated a bankrupt did any protest come from the Keck women, or any of them, as to the management of the two companies or the
31 adopted adjustment or reorganization of June, 1907. As a stockholder each in person or through her agent had a right to inspect and make a copy of the books and records of both companies. Cincinnati Volksblatt Co. vs. Hoffmeister, 62 Ohio St., 189. Their facilities for knowledge of the affairs of the two corporations were heightened by their membership in the directory of each. They not only remained silent when they should have spoken, but they actively participated when they should have protested, if they were dissatisfied with the management and intended to dispute the adjustment or the respective interests of the two corporations and of their stockholders.

Prior to June 1, 1907, the entire issued stock of the Duhme Company was held in trust for the Keck Company by the parties in whose name it stood. As the business of the Duhme Company was kindred, but not competing, there was no legal impediment to the Keck Company owning its stock. Sec. 3256 R. S. As a retailer of jewelry the former company was a customer of the later, a manufacturer of the same kind of goods. The former was a mere adjunct and asset of the latter. The proceedings had on June 1, 1907, by the stockholders and directors of the two companies resulted merely in a transfer into the name of the Keck Company of that which it already owned. Much that is said in Re Muncie Pulp Co., 139 Fed. Rep., 546, Reiger, Kapner & Altmark, 157 Fed. Rep., 609, and Re Watertown Paper Co. 169 Fed. Rep., 252, applies to the case at bar. In the Reiger, Kapner & Altmark case the entire capital stock of the corporation was in fact owned by the partnership, and the reports to the mercantile agencies showed such to be the fact. There was, as in this case, an inflation of values to obtain larger line of credit, and the existence of a partnership and a corporation was maintained, and successfully so, for the same purpose.

The contention that Clara Keck as administratrix had not the power to join in or assent to the action taken on June 1, 1907, by the corporations, and did not and could not, by her participation as a stockholder and director in the subsequent proceedings had by the company, ratify what was then done, is not meritorious. The stocks which stood in her husband's name were held by him as trustee for

and belonged to the Keck Company, and their transfer to it did not divest his estate of anything belonging to it. The increased amount of shares in the aggregate were of the same intrinsic value as those surrendered. The interest of the estate in the two companies remained relatively the same. The creditors of his estate, if there were any, herself, and her son, have not been injured.

32 The controversy is between the Keck women and the creditors. Whatever injury those three stockholders have sustained is due to mismanagement of the company's affairs before and after June 1, 1907, and not to what was done that day. Whatever may be their rights as against the managers of their affairs, their participation, acquiescence, and ratification are such as to debar them from relief as against creditors whose rights would be thereby injured.

The Duhme Company is endorser for the Keck Company for more than $48,000. Whether the validity of this endorsement is to be contested or not, does not appear. The funds arising from the sale of the property which stood in the name of the Duhme Company, and any unsold property, if there be such, of that company, in the Receiver's possession, may be surrendered by him to the Trustee in bankruptcy, who will keep a separate account thereof. If there be any unsold property, he should reduce it to cash. If no complication exists or arises, he should at an early date, if practicable, apply the funds, and the proceeds of property yet to be sold, to the satisfaction of debts due those who dealt in good faith with that company, and of its liability as an endorser, if the endorsement be valid. There should, however, be retained enough to pay such costs and expenses as are a proper charge for the administration of such company's affairs.

An order may be drawn in accordance with the foregoing, reserving all rights of dissatisfied parties.

Decree.

Entered June 2, 1910.

In the United States District Court, Southern District of Ohio, Western Division.

ALBERT LORSCH and ALFRED KROWER, Composing the Firm of Albert Lorsch & Company; Julius S. Oppenheimer, Henry S. Oppenheimer, August Oppenheimer, George A. Oppenheimer, Berthold Sinauer, Otto Sinauer, and Gustav F. Veith, Composing the Firm of Oppenheimer Bros. & Veith; Alvin L. Straussburger, and Solomon Kaiser, Composing the Firm of Louis Straussburger's Son & Company, Plaintiffs,

vs.

THE HERMAN KECK MANUFACTURING COMPANY, Defendant.

33 *Decree.*

This cause came on this day to be heard on the petition of Robert de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manu-

facturing Company, filed herein on March 28, 1910, and on his petition as receiver of the property and estate of The Duhme Jewelry Company filed herein on April 13, 1910, and on the answer and cross-petition of Amanda Keck filed herein on April 18, 1910, the answer and cross-petition of Emma Keck filed herein on April 18, 1910, the answer and cross-petition of Clara G. Keck, Administratrix of the Estate of Herman Keck, deceased, filed herein on April 18, 1910, the replication of Robert de V. Carroll as said Receiver and Trustee to said answers and cross-petitions filed herein on April 20, 1910, and upon the evidence, and was argued by counsel and submitted to the Court; on consideration whereof, the Court finds the issues joined in favor of said Robert de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, and that all of the property and assets of The Duhme Jewelry Company now or heretofore in his hands as Receiver was the property of the bankrupt herein, The Herman Keck Manufacturing Company, and is now the property of and belongs to said Robert de V. Carroll, as Trustee in Bankruptcy of its property and assets, and that neither said Amanda Keck, Emma Keck, Clara G. Keck, Administratrix of the Estate of Herman Keck, deceased, Louis R. Luebbert, Guardian of the Estate of Herman Keck, Jr., a minor, and Oscar Keck or any of them have any right title or interest to, or claim upon, any of said property and assets, as against the creditors of said Duhme Jewelry Co. or of said Keck Manufacturing Co., and it is therefore,

Ordered, adjudged and decreed that said answer and cross-petition of Emma Keck, said answer and cross-petition of Amanda Keck, and said answer and cross-petition of Clara G. Keck, Administratrix of the Estate of Herman Keck, deceased, be and the same are hereby dismissed at their costs, to all of which said Emma Keck, Amanda Keck Clara G. Keck Administratrix of the Estate of Herman Keck, deceased, Louis R. Luebbert, Guardian of the Estate of Herman Keck, Jr. a minor and Oscar Keck, severally except.

It is further ordered adjudged and decreed that said Robert de V. Carroll, as said Receiver of the property and estate of The Duhme Jewelry Company, forthwith turn over to himself as Trustee in Bankruptcy of the bankrupt herein, all of the property and assets, including cash, now in his hands as such Receiver, and that he keep an account thereof separate and distinct from his account of
34 the balance of the property of said bankrupt; to all of which said Emma Keck Amanda Keck, Clara G. Keck, Administratrix of the Estate of Herman Keck, deceased, Louis R. Luebbert, Guardian of the Estate of Herman Keck, Jr., a minor, and Oscar Keck also severally except.

Petition for Review of The Mitchell Store Building Company, Filed Nov. 21, 1910, and Exhibits and Papers Attached Thereto.

United States District Court, Southern District of Ohio, Western Division.

In Bankruptcy. No. 4281.

In the Matter of THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

I, Charles T. Greve, one of the referees in bankruptcy, to whom the foregoing proceedings were heretofore referred, do hereby certify that on November 21, 1910, a certain petition to review certain orders of the referee made herein as of date November 19, 1910, was filed by The Mitchell Store Building Compay. The referee attaches hereto and makes part hereof exhibits "A" An agreed statement of facts.

"B" Copy of Entry of November 19, 1910.

"C" Copy of the Application of The Mitchell Store Building Company.

"D" Copy of Order of October 24, 1910.

"E" Copy of Motion filed November 3, 1910.

"F" Copy of Motion filed November 14, 1910.

"G" Petition to Review.

I hereby certify that the referee has found herein that The Duhme Jewelry Company was and is now a department of The Keck Manufacturing Company, although regularly organized as a corporation of Ohio; that its capital stock for several years prior to the filing of the petition herein was owned by The Herman Keck Manufacturing Company, and that its officers and directors were the persons who were the officers and directors of The Herman Keck Manufacturing Company; that the referee has been and is administering such assets as have been called the assets of The Duhme Jewelry Company as assets of The Herman Keck Manufacturing Company, heretofore adjudicated a bankrupt, allowing to such claimants against the so-called assets of The Duhme Jewelry Company priorities as in equity said claimants by Section 64*b* (5) of the Bankruptcy Act may seem to be entitled to; and that the referee has as a matter of law held, and by the order complained of holds that any claims against the assets in the hands of the trustee in bankruptcy of The Herman Keck
35 Manufacturing Company whether against assets heretofore called assets of The Duhme Jewelry Company for convenience of classification, or other assets of the bankrupt company must be liquidated under the rules and orders of this Court as provided by the bankruptcy law, and must be presented for allowance either as general claims or as claims entitled to priority in the form prescribed by said law; and that no such claim has been presented as yet

to the referee by the petitioner herein with reference to the matter in controversy herein.

CHARLES T. GREVE,
Referee in Bankruptcy.

Nov. 22, 1910.

EXHIBIT "A."

Agreed Statement of Facts.

The Mitchell Store Building Company, a corporation under Ohio laws, was the owner of certain premises, No. 19 to 25 West Fourth Street, Cincinnati, Ohio, and on August 30, 1900, executed a written lease thereof to The Duhme Jewelry Company, a corporation under Ohio laws, for the term of ten (10) years and two (2) months, from November 1, 1900, to December 31, 1910. The lessee went into possession of these premises and continued to occupy and pay rent for the same until February 8, 1909, when a receiver was appointed for its property and assets and the receiver occupied said premises and paid rent for the same at the rate fixed in said lease, from February 8, 1909, to June 30, 1910. There was no rental due and unpaid from The Duhme Company to the lessor at the time when said receiver was appointed.

The Herman Keck Manufacturing Company, a corporation organized under the laws of Ohio, and engaged in the manufacture of jewelry, occupied a portion of these leased premises by agreement with The Duhme Jewelry Company, lessee. The lease from the Mitchell Store Building Company to The Duhme Jewelry Company was made in good faith and was made to The Duhme Jewelry Company alone, as a separate and distinct corporation from The Keck Manufacturing Company.

The Duhme Jewelry Company conducted a retail jewelry store on said premises and was a solvent corporation on February 8, 1909, with assets in excess of its liabilities. The Herman Keck Manufacturing Company was insolvent on February 8, 1909, and on February 8, 1909, certain creditors of the said Keck Manufacturing Company filed a petition in bankruptcy in this Court against said Keck Company and prayed for a receiver of the assets of the said company, which receiver was appointed on February 8, 1909,
36 by this Court. At the same time, the said petitioning creditors of The Keck Manufacturing Company filed an application in this Court for a receiver for the property and assets of The Duhme Jewelry Company, alleging therein that said Duhme Jewelry Company was a mere department and adjunct of said Keck Manufacturing Company and alleging that the petitioners believed that it was absolutely necessary and essential for the protection of the creditors of The Herman Keck Manufacturing Company and the preservation of the estate of The Herman Keck Manufacturing Company in bankruptcy that a receiver be appointed to take charge of the assets and the property of The Duhme Jewelry Company, and on

said February 8, 1909, a receiver was appointed by this Court for the property and assets of The Duhme Jewelry Company.

On May 1, 1909, on the petition of The Duhme Jewelry Company, this Court ordered the receiver of The Duhme Jewelry Company to pay fifty (50) per cent of the claims due to merchandise creditors of said Duhme Company.

Thereafter such proceedings were had in the bankruptcy proceedings against The Keck Manufacturing Company that on December 3, 1909, an order was entered, adjudicating The Keck Manufacturing Company a bankrupt and on the 14th day of February, 1910, a notice was published by the referee herein in the "Court Index," a copy of which is attached hereto. No copy of said notice was served upon or sent to The Mitchell Store Building Company. Thereafter a trustee of The Keck Manufacturing Company was elected and qualified.

On March 28, 1910, said trustee in bankruptcy filed a petition in this Court for authority to take charge of the assets of The Duhme Jewelry Company in the hands of the receiver of said company, alleging in his application that the said Duhme Company was a subsidiary company to the bankrupt and a mere department and adjunct of said bankrupt company, and thereupon on June 2, 1910, this Court made an order finding that all of the property and assets of The Duhme Company in the hands of its receiver was the property of the bankrupt herein and belonged to the Trustee in Bankruptcy of said Keck Manufacturing Company; and said order further directed the Receiver of The Duhme Jewelry Company to turn over to the Trustee of The Keck Manufacturing Company all of the property and assets, including cash in his hands as such receiver, and that said trustee keep an account thereof separate and distinct from his account of the balance of the property of said bankrupt.

This order was carried out and all of the property and cash
37 of The Duhme Company turned over to the trustee in bankruptcy. The Mitchell Store Building Company was not a party to the proceedings in bankruptcy or to the proceeding by which the trustee of the bankrupt obtained possession of the property of The Duhme Company by order of this Court.

On November 1, and 14, 1910, the referee herein entered an order directing the trustee in bankruptcy to pay the balance in full of all the claims against The Duhme Jewelry Company proved and allowed up to said dates, against the assets of said Company in the hands of the Trustee herein as set forth in said orders. The cash in the hands of the trustee herein, derived from the sale of the assets of The Duhme Jewelry Company, after payment in full of all claims heretofore so proved and allowed against said Duhme Company, is sufficient to pay the claim of The Mitchell Store Building Company as well as all other known claims against said Company, and there are no other assets or property of said company except the cash balance now in the hands of the trustee herein, derived from the sale of The Duhme Company's assets, which are kept in an account separate from the other property of the bankrupt. No dividend has been declared to the creditors of The Keck Manufacturing Company.

The trustee vacated the leased premises on June 30, 1910, and elected not to take said lease, under the order of this Court entered June 9, 1910.

The claim of The Mitchell Store Building Company against The Duhme Jewelry Company arose after the trustee vacated said premises on June 30, 1910, and the nature of said claim is set forth in the petition with copy of the lease attached in the suit, which it filed in the Court of Common Pleas of Hamilton County, Ohio, against The Duhme Jewelry Company, as hereinafter alleged.

On October 8, 1910, The Mitchell Store Building Company brought an action at law against The Duhme Jewelry Company in the Common Pleas Court of Hamilton County Ohio (and service of summons was made upon said corporation in said suit), claiming the sum of six thousand five hundred ($6,500.00) dollars damages on its claim, as set forth above. On the same date the said Mitchell Store Building Company notified the trustee herein that said suit had been filed and delivered to said trustee, by registered mail a copy of the petition filed in said case. On the same date The Mitchell Store Building Company filed in this Court an application praying for an order directing the trustee to withhold from distribution of the assets of The Duhme Jewelry Company, until final judgment was rendered in said suit in said Common Pleas Court
38 (a copy of the petition in said suit being attached to said application), which application recited that said suit had been filed in the Common Pleas Court of Hamilton County, Ohio, against The Duhme Jewelry Company for the sum of Six Thousand five hundred ($6,500.00) dollars for breach of certain covenants contained in a lease made by The Mitchell Store Building Company to The Duhme Jewelry Company, and that said contract of lease, upon which suit had been brought, was entered into in good faith with The Duhme Jewelry Company as a distinct, separate and solvent company, and that owing to the nature of its claim against The Duhme Jewelry Company it was impossible before that time to ascertain the amount of its claim against said company, arising from the breach of the covenants in said lease, and that said suit in the Common Pleas Court was necessary in order to determine the amount of the liability of the said Duhme Company thereon. Said application further recited that all of the assets of said Duhme Company had been transferred to the trustee of the Herman Keck Manufacturing Company, bankrupt, by order of this Court subject to the bona fide claims against said Duhme Company, which assets were kept in a saparate account by said trustee under order of this Court.

Nothing herein contained shall prevent either party hereto from referring to or making use of any of the pleadings, proceedings, or evidence heretofore had in this cause.

CHARLES T. GREVE,
Referee in Bankruptcy.

Nov. 22, 1910.

Notice of First Meeting of Creditors.

In the United States District Court, Southern District of Ohio, Western Division.

In Bankruptcy. No. 4281.

In the Matter of THE HERMAN KECK MANUFACTURING COMPANY OF CINCINNATI, OHIO, Bankrupt.

To the creditors of The Herman Keck Manufacturing Company of Cincinnati, in the County of Hamilton, State of Ohio, and District aforesaid, Bankrupt:

Notice is hereby given that on the 3rd day of December, A. D. 1909, the said The Herman Keck Manufacturing Company was duly adjudicated bankrupt, and that the first meeting of its creditors will be held at Room 320 Carlisle Building, southwest corner Fourth and Walnut Streets, in Cincinnati, on the 25th day of February, A. D. 1910, at 3 o'clock in the afternoon, at which time the said
39 creditors may attend, prove their claims, appoint a trustee, examine the bankrupt and transact such other business as may properly come before said meeting.

Claims against The Herman Keck Manufacturing Company or against The Duhme Jewelry Company, to be entitled to allowance at this meeting must be proved in accordance with the Bankruptcy Act and General Order in Bankruptcy No. XXI and the forms adopted by the Supreme Court.

Creditors of The Herman Keck Manufacturing Company and The Duhme Jewelry Company are notified that at said meeting, an immediate partial distribution upon claims entitled to priority of payment, if any such there be, will be for consideration.

CHARLES T. GREVE,
Referee in Bankruptcy.

Cincinnati, Ohio, February 14, 1910.

EXHIBIT "B."

United States District Court, Southern District of Ohio, Western Division.

No. 4281. Equity.

In the Matter of THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

This cause came on to be heard upon the motion of The Mitchell Store Building Company filed herein November 14, 1910, to strike from the files a motion of the trustee in bankruptcy filed herein

November 3, 1910, seeking to set aside the order of this Court entered October 24, 1910, which order directed the Trustee to withhold from distribution the sum of six thousand five hundred ($6,500.00) Dollars to await the determination of the claim of The Mitchell Store Building Company, and was submitted to the Court. Upon consideration of which, after argument, the Court finds that while said order of October 24, 1910, was entered by consent of The Mitchell Store Building Company and the Trustee herein, said consent of the Trustee and the order of the Referee was based on a misapprehension of the scope of said order of October 24, 1910, and said motion is therefore not well taken and the same is hereby overruled, to which the said Mitchell Company excepts.

Thereupon this cause came on to be heard upon the motion of the Trustee filed herein November 3, 1910, to set aside said order of this Court made October 24, 1910, and after argument was submitted to the court. Upon consideration whereof the Court grants said motion for the reasons above stated and orders that the said entry of October 24th be set aside, to which said Mitchell Company excepts. Leave is given said Mitchell Company to renew its application filed herein October 8, 1910.

Thereupon this cause came on to be heard upon the application of The Mitchell Store building Company filed herein October 8, 1910, for an order directing the Trustee of the Keck Manufacturing Company, Bankrupt, to withhold from the distribution of the assets of the Duhme Jewelry Company the sum of six thousand five hundred ($6,500.00) Dollars, to await the final determination of the suit filed by it against the Duhme Jewelry Company in the Court of Common Pleas, Hamilton County, Ohio, and after argument was submitted to the Court. Upon consideration whereof the Court does find that the assets in the hands of the Trustee of the Keck Manufacturing Company are subject to distribution by the Trustee of the Keck Manufacturing Company to creditors of said Company, and to such claimants as by their claims against the Duhme Jewelry Company and its assets (heretofore found to be a part of the Keck Manufacturing Company) shall be determined to be creditors of the Keck Manufacturing Company entitled to have priority in the distribution of said assets over the general creditors of the Keck Manufacturing Company. And thereupon the Court refuses the prayer of said application of said Mitchell Company filed herein October 8, 1910, to which said Mitchell Company excepts.

Enter.

(Signed) CHARLES T. GREVE,
Referee in Bankruptcy.

Nov. 19, 1910.

EXHIBIT "C."

Copy.

United States District Court, Southern District of Ohio, Western Division.

No. 4281.

In re HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Application of The Mitchell Store Building Company for an Order Directing the Trustee Herein to Withhold $6,500.00 from the Distribution of The Duhme Jewelry Company Assets.

Now comes The Mitchell Store Building Company, a corporation under the laws of Ohio, and represents to the Court that it has filed suit in the Court of Common Pleas of Hamilton County, Ohio, against The Duhme Jewelry Company, a corporation under the laws of Ohio, for the sum of six thousand five hundred ($6,500.00) dollars for breach of certain covenants contained in a lease made by said The Mitchell Store Building Company to The Duhme
41 Jewelry Company on August 30, 1900, of certain real estate in Cincinnati, Ohio, known as No-. 19, 21, 23 and 25 West Fourth Street, that said cause of action will appear from a copy of the petition filed in said suit and hereto attached.

The Mitchell Store Building Company further represents that the contract of lease, upon which said suit has been brought, was entered into by it in good faith with The Duhme Jewelry Company as a distinct, separate and solvent company.

The Mitchell Store Building Company further represents that owing to the nature of its claim herein against The Duhme Jewelry Company it was impossible before the present time to ascertain the amount of the claim of The Mitchell Store Building Company against said The Duhme Jewelry Company arising from the breach of the covenants in said lease and that said suit in the Common Pleas Court is necessary in order to determine the amount of the liability of the said The Duhme Jewelry Company.

The Mitchell Store Building Company further represents that all of the assets of The Duhme Jewelry Company have by order of this Court, been transferred to the Trustee of The Herman Keck Manufacturing Company, bankrupt, subject to the bona fide claims against said The Duhme Jewelry Company, and that an order has been made by this Court whereby a separate account shall be kept by said Trustee of all the assets of The Duhme Jewelry Company.

By reason of the foregoing The Mitchell Store Building Company hereby prays the Court for an order directing the Trustee of The Keck Manufacturing Company, bankrupt, to withhold from the distribution of the assets of The Duhme Jewelry Company the sum of

Six Thousand Five Hundred ($6,500.00) Dollars until final judgment is rendered in said suit.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorneys for The Mitchell Store Building Company.

Copy.

State of Ohio, Hamilton County, Common Pleas Court.

No. 146,389.

THE MITCHELL STORE BUILDING COMPANY, a Corporation under the Laws of Ohio, Plaintiff,
vs.
THE DUHME JEWELRY COMPANY, a Corporation under the Laws of Ohio, Defendant.

Petition.

42 Now comes The Mitchell Store Building Company, plaintiff herein, a corporation under the laws of the State of Ohio, and says that on the 30th day of August, A. D. 1900, it entered into a contract of lease with the defendant herein, The Duhme Jewelry Company, a corporation under the laws of the State of Ohio, whereby said plaintiff leased to said defendant certain premises in Cincinnati, Ohio, Hamilton County, known as number 19, 21, 23 and 25 West Fourth Street, and otherwise known as The Mitchell Store Building, reserving therefrom however certain parts of said premises as appear in the copy of said lease which is hereto attached and marked Exhibit A.

Plaintiff further says that by the provision of said lease defendant agreed,

1. To take said premises for the period of ten years and two months beginning November 1, 1900, and ending December 31, 1910. "Yielding and paying therefor the yearly rental of Fifteen Thousand ($15,000.00) Dollars payable in equal installments of Twelve Hundred and Fifty ($1,250.00) Dollars in advance, on the first day of each and every month in each and every year during the first five years of said term and the yearly rent of sixteen thousand ($16,000.00) Dollars during each of the second five years of said term, and at that rate per annum for the last two months of said term, payable in equal installments of Thirteen Hundred and Thirty-three Dollars and thirty-three and one third cents ($1,333.33-) in advance on the first day of each and every month in each and every year during the last five years and two months of said term."

2. That it would not do or suffer any waste in or on said premises; that it would "at its own expense and without any demand on the lessor therefor keep the building hereby leased and the elevator

plants heating apparatus and machinery of other kinds in said building in continuous good order and repair" and that at the end of said lease it would "deliver up said premises hereby leased and said elevators, elevator plants, heating apparatus and machinery in good order and condition."

For cause of action plaintiff says:

1. That defendant after taking possession under this lease failed to keep the building and the elevators in said building in continuous good order and repair in violation of the covenants of this lease and committed waste in and upon said premises in the following manner, to-wit:

A. By wholly removing a handsome hardwood staircase which connected the ground floor of the store known as 21 and 23
43 west Fourth Street with the second floor thereof.

B. By wholly removing the passenger elevator shaft in said store known as 21 and 23 West Fourth Street, disconnecting the machinery and appliances of said elevator and allowing the parts of said shaft, machinery and appliances to fall into decay to be lost and to become wholly useless.

C. By wholly tearing down and removing sixty (60) feet of brick partition wall upon the sixth floor of said store known as 21 and 23 West Fourth Street, and otherwise tearing out and removing other partition walls and staircases belonging to said Mitchell Store Building. All *of* the damages of said plaintiff in the sum of Two Thousand ($2,000.00) Dollars.

For further cause of action plaintiff says:

2. That on or about July 1, 1910, defendant vacated said Mitchell Store Building, ceased paying rent and wholly abandoned the premises, that thereupon said plaintiff diligently sought to find a new tenant for said premises; that after diligent effort to obtain the highest possible rent plaintiff made a lease of said premises to The George W. McAlpin Company for five (5) years beginning October 10, 1910, at a net yearly rental of twelve thousand ($12,000.00) Dollars per year. Plaintiff says that it has received from The George W. McAlpin Company for use and occupation of certain parts of said premises the sum of Two Hundred and Fifty ($250.00) Dollars per month since July 1, 1910.

Plaintiff says by reason of the foregoing that the defendant is indebted to plaintiff for balance of rent under said lease in the sum of Sixty-five hundred ($6,500.00) Dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of Sixty-five hundred ($6,500.00) Dollars with interest from the 1st day of July, 1910, and for all proper relief.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorney- for Plaintiff.

STATE OF OHIO,
Hamilton County, ss:

A. J. Redway being duly sworn states that he is Secretary and Treasurer of The Mitchell Store Building Company, and that the statements of the foregoing petition are true.

(Signed) A. J. REDWAY.

Sworn to before me and signed in my presence this — day of —— 1910.

44

——— ———,
Notary Public, Hamilton County, Ohio.

Præcipe.

To the Clerk:

Issue summons on defendant in the above entitled action returnable according to law and indorse: "Action for money only."

——— ———,
Attorneys for Plaintiff.

"Lease.

The Mitchell Store Bldg. Co. The Duhme Jewelry Co.

This lease made this thirteenth day of August, A. D. 1910, between The Mitchell Store Building Company, a corporation under the laws of the State of Ohio, lessor, and The Duhme Jewelry Company, also a corporation under the laws of the State of Ohio, lessee.

Witnesseth: That said lessor in consideration of the rents and covenants hereinafter contained, and by said lessee its successors and assigns to be paid and performed, does hereby, Grant, Demise and Lease to the said Lessee its successors and assigns, the premises situate on the South side of Fourth Street between Vine and Race Streets in the City of Cincinnati, in the County of Hamilton, and State of Ohio, being what is known as "The Mitchell Store Building and Numbered 19, 21, 23 and 25 West Fourth Street, excepting and reserving therefrom the parts thereof now occupied by S. Morton & Sons being the first floor and basement of said number 19, and the part now leased to E. N. Roth being the first and second floors and sub-basement of said number 25.

To Have and To Hold the same, with the appurtenances, unto the said lessee its successors and assigns, from and including the first day of November A. D. 1900 for and during the full term of ten (10) years and two (2) months next ensuing and fully to be completed and ended on the thirty-first day of December A. D. 1910.

Yielding and paying therefore the yearly rent of fifteen thousand ($15,000) dollars payable in equal installments of twelve hundred and fifty (1250) dollars in advance, on the first day of each and every month in each and every year during the first five years of said term and the yearly rent of sixteen thousand (16,000) dollars dur-

ing each of the second five years of said term, and at that rate per annum for the last two months of said term, payable in equal installments of thirteen hundred and thirty-three dollars and thirty-three and one third cents ($13,333.33-) in advance on the first day of each and every month in each and every year during the last five years and two months of said term.

45 Said lessor expects to give possession of said leased premises to said lessee on the first day of next October and agrees to give it possession as early as practicable during that month and further agrees that said lessee shall have the possession of said leased premises free of rent for thirty (30) days after possession shall be tendered to it by said lessor.

And said lessee for itself, its successors and assigns covenants and agrees with said lessor, its successors and assigns as follows: That is to say, that said lessee will pay said rents in manner aforesaid, unless said premises shall be destroyed or rendered untenable by fire or unavoidable casualty, that the portion of said rents which it may retain under the provision of this lease, hereinafter set forth, it will apply in such provision stated that it will not do or suffer any waste in or on said premises hereby leased, that it will not assign this lease, except to a successor in business without the written consent of said lessor, its successors or assigns, first had and obtained, that it will not use or permit to be used the said premises or any part thereof of carrying on the business of manufacturing or selling malt, vinous or spiritous liquors nor for any illegal business and that if the business which may at any time during the said term be carried on by it, or by its successors or assigns or by any of its subtenants shall increase the rate of insurance upon the building included in this lease above that which would be charged for alone carrying on therein the business of dealing in buying, selling and cutting diamonds, and other precious stones, dealing in buying, selling and manufacturing jewelry, goldware, silverware, platted ware, watches, clocks, fancy goods, bric brac and dealing, buying, selling and manufacturing the class and character of goods now handled by The Duhme Jewelry Company and The Herman Keck Manufacturing Company of Cincinnati, Ohio, and as carried on by Tiffany and Co. of New York City, and in other material not more hazardous, that said lessee will pay such increase premium upon an amount of insurance not to exceed $75,000. That it will at its own expense and without charge therefor during the term of this lease furnish to said lessor its successors and assigns, sufficient steam heat to supply the present radiators, and not to exceed four in addition thereto, in those parts of said The Mitchell Store Building, now occupied by said S. Morten & Sons and the part now under lease to said E. N. Roth and which parts hereinbefore described as such heat may be needed during the business hours of the business days by the parties

46 who may at any time during the term of this lease be the tenant or tenants of such part of said building.

The furnishing of such heat to begin as soon as The Robert Mitchell Furniture Co., shall vacate the premises now occupied by it, and included in this lease; that it will during the term of this

lease at its own expense and without any demand on the lessor, Therefor keep the building hereby leased and the elevators plants, heating apparatus and machinery of every kind in said building in continuous good order and repair, except as to damage by fire or other unavoidable casualty and that all improvement of permanent nature that it may make to the inside and outside of the building included in this lease shall become a part of the realty and become the property of said lessor without compensation other than this lease to be paid to it therefor; that except as may be herein otherwise provided, all damages that lessee may wish made or in or to the building included in this lease, it will cause to be made at its own expense and without demand upon the said lessor therefor, and except as temporary partitions after first having obtained the consent of the said lessor to make the same and that at the end of said term it will deliver up said premises hereby leased and said elevators, elevator plant, heating apparatus and machinery in good order and condition, except as to such damage, if any, as may be done by fire, or other unavoidable casualty and further that for the said rents to be paid by it as aforesaid, a lien is hereby reserved upon the premises hereby leased and the interest of said lessee in and to the same in favor of said lessor, its successors and assigns prior and preferable to any and all other liens thereon whatsoever.

Said lessee is to put the building included in this lease in good order and repair to lay one hundred lineal feet of granatoid sidewalk, make such repairs, if any, as may be needed to the elevator plants, and machinery connected therewith and to the steam heating plant and apparatus in said building and to paint when needed the outside woodwork of said building.

And it is agreed between the said lessor and lessee on behalf of themselves and their respective successors and assigns that said lessee may retain out of each of the said monthly installments of rents, the sum of one hundred and fifty (150) dollars, until the sum retained shall amount to the sum of eighteen hundred (1,800) dollars and which amount the said lessee is to apply on account of the costs of the said specially mentioned repairs and to the costs of any other repairs that said lessee may make and the said sum is
47 the part of the cost of such repairs that said lessee its successors and assigns are to pay and said lessee, its successors and assigns are to present voucher to said lessor its successors and assigns showing such expenditure of said sum.

The said lessee has deposited with said lessor ten shares of the capital stock of the Western German Bank of Cincinnati, Ohio, of the face value of $1,000 and indorsed in blank as security for the payment of the first two installments of said rents to become due, in addition to the guaranty hereinafter given, it being hereby agreed between the parties hereto that when said lessee shall have paid in money to said lessor its successors or assigns of the said rents the full sum of twenty-two hundred (2,200) dollars, then said lessor, its successors or assigns shall return to said lessee, its successors or assigns, the said shares of stock and that in the meantime, said lessor, its successors or assigns, may use said shares as collateral.

Permission is hereby given to said lessee, its successors and assigns to use the basement under said number 25, without charge therefor, until such time as said lessor, its successors or assigns may wish the same for the use of a tenant of the store room of said number 25 West Fourth Street in said City, and within thirty days after being notified in writing so to do, said lessee for itself, its successors and assigns hereby agrees to vacate said basement and to surrender possession thereof to said lessor, its successors or assigns.

And the said lessor for itself, its succesors and assigns hereby covenants and agrees to and with the said lessee, its successors and assigns that on and after the present tenancies of S. Morton & Sons and E. N. Roth shall respectively expire, it will not for any part of the term of this lease or renewal thereof, rent or lease the said premises now occupied by or included in those rented or leased to them or either of them for a general business or store, that in renting or lease- said premises or any part thereof, the lease or terms shall be on condition that the tenant or tenants shall not carry on a general jewelry store or business, shall not give any permission of said S. Morton & Sons and E. N. Roth or their assigns, or subtenants to carry on a general jewelry business therein.

Provided however, that if said rent or any part thereof shall remain unpaid for ten (10) days, after it shall become due and with demand made therefor, or if said lessee shall assign this lease to any party other than a successor in business or if said lessee's interest therein shall be sold under execution or other legal process
48 without the written consent of said lessor, or if said lessee shall use or permit to be used the said premises or any part thereof for the carrying on, or if there shall be carried on with the knowledge of said lessee upon said premises or any part thereof the manufacture or sale of malt, vinous or spiritous liquors or any illegitimate business or if said lessee, its successors or assigns fail to keep any of the other covenants or obligations of this lease by it or them to be kept, it shall be lawful for said lessor into said premises to reenter and the same to have again repossess and enjoy as in its first and former estate and thereupon this lease and everything therein contained on the said lessor's behalf to be done and performed shall cease determine and be utterly void.

Said lessee, its successors and assigns having promptly paid the said rents as aforesaid and having faithfully kept and performed all of the other covenants and agreements of this lease on its and their part to be kept and performed are hereby given a right to a renewal of this lease at the expiration of said term for an additional term of five years, beginning on the first day of January, 1911, and ending on the 31st day of September, 1915, upon the same terms and conditions as are contained in this lease, except that there shall be no right of renewal and that the annual rent to be paid by said lessee, its successors and assigns for said premises hereby leased during such addition- term shall be eighteen thousand (18,000) dollars, payable in equal installments of fifteen hundred (1500) dollars in advance on the first day of each and every month in each and every year

during such additional term, the first of such installments being payable on January 1, 1911.

Provided that said lessee, its successors or assigns shall on or before the first day of May 1910 notify in writing the said lessor, i-s successors or assigns of its or their intention to exercise such right of renewal and such notice may be given by a letter addressed to the lessor or to its successors or assigns, if any, such successors or assigns there shall be at its or their place of business and deposit it in the Post Office at Cincinnati, Ohio, postage paid or if the place of business of the said lessor, its successors or assigns cannot be found, then such notice may be delivered to the party who may collect the rent.

And said lessor for itself and its successors or assigns covenants and agrees with said lessee, its successors or assigns, that said lessee paying the rents and observing and keeping the covenants of this lease on its part to be kept shall lawfully, peaceably and
49 quietly hold, occupy and enjoy said premises during said term without any let, hindrance, objection, or molestation by said lessor or its successor or any other person or persons whatsoever.

And Herman Keck and Oscar Keck now residing and doing business at Cincinnati, Ohio, stockholders of the lessee in consideration of the making of this lease and for other valuable consideration having read the foregoing lease and approving all its terms and conditions jointly and severally on behalf of themselves and their respective heirs, executors and administrators hereby guarantee unto the said lessor, its successors and assigns that the said lessee, its successors and assigns will pay the rents and at the same time and in the name hereinbefore stipulated for and that said lessee, its successors and assigns will faithfully keep and observe all and singular the covenants agreements and stipulations contained in the foregoing lease on the part of the said lessee, its successors and assigns to be kept.

In Witness Whereof, the said lessor and lessee have caused their respective names, to be signed hereto and their respective corporate seal- to be hereto affixed by their respective presidents and secretaries duly authorized so to do and the said Herman Keck and Oscar Keck have also respectively hereto signed their respective names and to a duplicate thereof, on the day and year first above written the corporate seal of said lessee being an ink scrawl duly adopted by it, it having none other.

THE MITCHELL STORE BUILDING COMPANY,
By A. J. REDWAY, *President, and*
STEPHEN H. BURTON, *Secretary.*
THE DUHME JEWELRY COMPANY,
Per HERMAN KECK, *President.*
OSCAR KECK, *Sec't'y.*
HERMAN KECK.
OSCAR KECK.

Signed and acknowledged in presence of us
HERBERT JENNEY,
FRANCIS B. JAMES,
As to The M. S. R. Co.

(Corporate Seal.)

A. J. REDWAY, *Pres't, and*
STEPHEN H. BURTON, *Sec't'y,*
R. KLEYBOLTE,
SPENCER M. JONES,
FRANCIS B. JAMES,
As to Duhme Jewelry Company,
By HERMAN KECK, *Pres.*

(Corporate Seal.)

OSCAR KECK, *Sec'y.*
HERMAN KECK.
OSCAR KECK.

STATE OF OHIO,
Hamilton County, ss:

Be it remembered that on the fifth day of September A. D. 1900 before the subscriber a Notary Public in and for said County, personally came the Mitchell Store Building Company, a corporation under the laws of the State of Ohio, by A. J. Redway, its President and Stephen H. Burton its Secretary of the parties named in the foregoing lease and acknowledged the signing thereof in its name and the affixing thereto of its corporate seal to be its and their voluntary act and deed for the uses and purposes therein mentioned, and the said A. J. Redway and Stephen H. Burton also acknowledged that they are respectively the President and Secretary of the said The Mitchell Store Building Company and as such President and Secretary they executed the foregoing lease in the name and on behalf of said Company and affixed thereto its corporate seal by order of its Board of Directors and that the signing and sealing thereof in the name and on behalf of said corporation are its and their voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto subscribed my name and affixed my Notarial Seal on the day and year last aforesaid.

[N. P. SEAL.] EARL P. PASSEL,
Notary Public, Hamilton County, Ohio.

STATE OF OHIO,
County of Hamilton, ss:

Be it remembered that on the tenth day of September A. D. 1900, before me the subscriber a Notary Public in and for said County, personally came The Duhme Jewelry Company, a corporation under the State of Ohio, by Herman Keck its President and Oscar Keck its Secretary of the parties named in the foregoing lease and acknowledged the signing thereof in its name and the affixing thereto of its

corporate seal to be its and their voluntary Act and deed for the uses and purposes therein mentioned and the said Herman Keck and Oscar Keck also acknowledged that they are respectively the
51 President and Secretary of the Duhme Jewelry Company and as such President and Secretary they executed the foregoing lease in the name and on behalf of said Company and affixed thereto its Corporate Seal by order of its Board of Directors and that the signing and sealing thereof, in the name and on behalf of said corporation are its and their voluntary act and deed for the uses and purposes therein mentioned and also personally appeared before me Herman Keck and Oscar Keck of the parties named in the foregoing lease and acknowledged the signing and sealing thereof to be their voluntary act and deed for the uses and purposes therein mentioned. In Witness Whereof, I have hereunto subscribed my name and affixed my notarial seal on the day and year last aforesaid.

[N. P. SEAL.] SPENCER M. JONES,
Notary Public, Hamilton County, Ohio.

$1 Int. Revenue Stamp Cancelled.

The foregoing is the lease read to the Board of Directors of The Mitchell Store Building Company at its meeting held this fifth day of September 1900 and referred to in the Minutes of that Meeting.

STEPHEN H. BURTON, *Sec'y.*

The foregoing is the lease read to The Board of Directors of The Duhme Jewelry Company at its meeting held this tenth day of September 1900 and referred to in the minutes of that meeting.

OSCAR KECK, *Sec'y.*

Received for record May 23rd, 1903, at 9:32 A. M. 5th Series General Index Bk. 2 page 288.

Copy.

"EXHIBIT D."

United States District Court, Southern District of Ohio, Western Division.

No. 4281.

In re HERMAN KECK MANUFACTURING Co., Bankrupt.

Order.

This cause came on this day to be heard upon the application of The Mitchell Store Building Company filed in this cause October 8, 1910, praying the Court for an order directing the trustee of the bankrupt to withhold from the distribution of the assets and moneys

of the Duhme Jewelry Company the sum of six thousand five hundred ($6,500.00) dollars to meet the claim for said amount made by said The Mitchell Store Building Company against said Duhme Jewelry Company in case the same or any part thereof was finally determined to be a valid claim of The Duhme Jewelry Company. Upon consideration whereof the Court granted said motion and said trustee is directed to withhold from distribution said sum of six thousand five hundred ($6,500.00) dollars to await the determination of said claim.

52

CHARLES T. GREVE,
Referee in Bankruptcy.

Oct. 24, 1910.

Copy.

"EXHIBIT E."

United States District Court, Southern District of Ohio, Western Division.

No. 4281.

In re HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Motion of Robert Dev. Carroll, Trustee Herein, to Set Aside Order Entered by the Referee on October 24, 1910.

Now comes Robert De V. Carroll, Trustee herein, and moves the Court to set aside the order entered by the Referee herein on October 24, 1910, on the following grounds:

1. That said order unnecessarily ties up funds of the Duhme Jewelry Company now in his hands and which should be applied to valid claims against the Keck Manufacturing Company.
2. That the claim of the Mitchell Store Building Company referred to in said order can be more speedily determined in this Court than in the Common Pleas Court of Hamilton County, Ohio.
3. That said claim should be determined by this Court and not by said Common Pleas Court.
4. That said Mitchell Store Building Company has already submitted itself to the jurisdiction of this Court and its claim should therefore be determined herein.

ROBERT DE V. CARROLL,
Trustee in Bankruptcy of The Herman Keck Manufacturing Company.
MAXWELL & RAMSEY,
Attorneys for said Trustee.

Filed Nov. 3rd, 1910.

"EXHIBIT F."

United States District Court, Southern District of Ohio, Western Division.

No. 4281.

In re THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

53 *Motion of The Mitchell Store Building Company to Strike from the Files the Trustee's Motion of November 3, 1910.*

Now comes The Mitchell Store Building Company and moves the Court to strike from the files the motion of the trustee herein, filed November 3, 1910, which seeks to set aside the order made by this Court on October 24, 1910, for the following reasons:

1. That said order of October 24, 1910, was entered by this Court with the approval and consent of said trustee after the hearing of the application of The Mitchell Store Building Company filed in this Court October 8, 1910.

2. That the matters and things contained in said trustee's motion of November 3, 1910, as reasons for setting aside the order of this Court made October 24, 1910, were involved and determined by said order of October 24, 1910 entered upon the application of The Mitchell Store Building Company, which was filed October 8, 1910.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorneys for The Mitchell Store Building Company.

Filed Nov. 4, 1910.

"EXHIBIT G."

United States District Court, Southern District of Ohio, Western Division.

No. 4281.

In the Matter of THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Petition of The Mitchell Store Building Company to Review Order of the Referee.

To the Honorable John E. Sater, Judge of the United States District Court, Southern District of Ohio:

Now comes The Mitchell Store Building Company and files this its petition to review, and represents to this Court that it is the owner of certain premises on West Fourth Street, Cincinnati, Ohio,

which it leased by written lease to The Duhme Jewelry Company, a corporation under the laws of Ohio, on August 30, 1900, for a term of ten years and two months, expiring December 31, 1910; that it has a claim against said Duhme Jewelry Company for damages for breach of the covenants of said lease in reference to the payment of rental thereunder from June 30, 1910, to the expiration of said lease on December 31, 1910, and also for the breach of certain other covenants of said lease as to the restoration of said premises; that
54 said claim against said Duhme Jewelry Company arose subsequent to June 30, 1910, and the said The Mitchell Store Building Company has filed suit upon said claim against said Duhme Jewelry Company in the Common Pleas Court of Hamilton County, Ohio, which suit was filed October 8, 1910, and service of summons was had upon said company, in which suit it prays judgment against said Company for the sum of Sixty-five hundred ($6,500.00) Dollars damages for said breaches of said written lease, in which suit the validity and amount of your petitioner's claim is involved and sought to be determined. Your petitioner avers that the said Duhme Jewelry Company has not been adjudicated a bankrupt, and your petitioner's said claim against said company is not one which would be discharged by a discharge granted to the bankrupt in this case.

On October 8, 1910, this petitioner filed before the referee in this Court an application reciting that said suit had been filed against said Company in the Common Pleas Court of Hamilton County, Ohio, and that the same was necessary to determine the amount of liability of said company for breach of the covenants of said lease and praying the Court for an order directing the trustee of The Herman Keck Manufacturing Company, in whose possession the property and assets of The Duhme Jewelry Company had been placed by order of this Court made June 2, 1910, to withhold from distribution to the creditors of The Keck Manufacturing Company out of the funds in his hands derived from the sale of the assets of The Duhme Jewelry Company, the said sum of Sixty-Five Hundred ($6,500.00) Dollars until final judgment was rendered in said suit.

Thereupon said application after due notice to said trustee, came on for hearing before the Referee and with the consent of said trustee by his counsel of record, an order was entered October 24, 1910, directing said trustee to withhold from distribution said sum of Sixty-five Hundred ($6,500.00) Dollars to await the determination of said claim.

Thereupon on November 3, 1910, the said trustee filed a motion in this Court before said referee, moving to set aside said order of October 24th on the grounds stated in said motion, and thereupon on November 14, 1910, your petition- moved to strike said motion from the files, which motion the Court overruled, to which exception was taken; and thereupon on November 19, 1910, said Referee entered an order granting said Trustee's motion of November 3rd and setting aside the said order of October 24th, to which
55 exception was taken; and thereupon said Referee re-considered the application of your petitioner filed October 8,

1910, and entered an order denying the same, to which exception was duly taken.

Your petitioner complains of the following errors in the findings and order of said Referee, to-wit:

1. Said Referee erred in overruling the motion of this petitioner to strike from the files the motion of the Trustee filed November 3, 1910, to which exception was duly noted.

2. Said Referee erred in granting said Trustee's motion of November 3, 1910, and in setting aside said order of October 24, 1910, to all of which exception was duly taken.

3. Said Referee erred in denying the application of your petitioner filed October 8, 1910, to withhold from distribution the sum of Sixty-five Hundred ($6,500.) Dollars until final judgment was rendered in the suit filed by your petitioner in the Common Pleas Court of Hamilton County, Ohio, to which exception was duly taken.

Your petitioner avers that the cash in the hands of the Trustee herein, derived from the sale of the assets of The Duhme Jewelry Company and by order of this Court kept separate and distinct from the remaining property of the bankrupt herein, is more than sufficient to meet the claim of your petitioner and any other known claims still unpaid, and that all the claims against The Duhme Jewelry Company have been paid except the claim of your petitioner and several other creditors whose claims are either in dispute or have not been presented, and that there are no other assets of said Duhme Jewelry Company than said cash now remaining in the hands of the Trustee herein derived from the sale of the Duhme Company's assets. Your petitioner avers that the trustee herein has asserted and does now assert, that this petitioner is bound to present its claim against said Duhme Company arising upon said lease as aforesaid, to this Court for adjudication as to its validity and amount, and said trustee has further asserted, and does now assert, that this Court, of bankruptcy has exclusive jurisdiction to determine the amount and validity of the said claim, and does assert that said petitioner's claim upon said lease must be presented to this Court for determination and allowance, the same as a claim against the bankrupt herein, within one year from December 3rd 1909, the date when said Keck Manufacturing Company was adjudicated a bankrupt; and said trustee has asserted, and does now assert, that unless this petitioner presents its claim arising upon said
56 lease to this Court before December 3, 1910, for determination, he will distribute as a dividend to the creditors of the bankrupt herein, the cash in his hands derived from the sale of said Duhme Company's assets which would be applicable to your petitioner's claim, if held valid. And your petitioner avers that if said cash is distributed there will be no assets or money remaining out of which your petitioner can be paid its claim if judgment is rendered in favor of your petitioner in said suit now pending in the Common Pleas Court.

Your petitioner further avers that it is impossible before December 3, 1910, to bring said suit in said State Court to trial and determination.

Wherefore your petitioner prays that said order of the Referee may be reviewed, and that the order overruling the motion to strike from the files the Trustee's motion of November 3, 1910, be reversed, and that said motion be stricken from the files; that the order granting the said Trustee's motion of November 3, 1910, and setting aside the order of the Court made October 24, 1910 be reversed and set aside; that the order of said Referee denying and refusing the application of your petitioner filed October 8, 1910, be reversed and set aside; and that an order be entered granting said application filed October 8, 1910, and directing said Trustee to withhold from distribution to the creditors of the Keck Manufacturing Company out of the cash in his hands derived from the sale of the Duhme Company's assets, the sum of sixty-five hundred ($6,500.00) Dollars to await the final determination of said suit pending in the Court of Common Pleas of Hamilton County, Ohio, and further, for an order directing that in the event it is ultimately decided that this Court has exclusive jurisdiction to determine the amount and validity of your petitioner's claim against said Duhme Jewelry Company, your petitioner have leave to then have the same determined and allowed in this Court, and that said Trustee hold said sum of Sixty-five hundred ($6,500.00) Dollars to await the final determination of said claim in this Court; and for such other relief as your petitioner may be entitled to under the circumstances of this case.

P. LINCOLN MITCHELL,
DECAMP & SUTPHIN,
Attorneys for Petitioner.

57 (*Opinion of Judge Sater. Filed December 28th,* 1910.)

United States District Court, Southern District of Ohio, Western Division.

No. 4281.

In the Matter of THE HERMAN KECK MFG. CO., Bankrupt.

On Application for Restraining Order.

SATER, *District Judge:*

At or about the time the petition in bankruptcy was filed against The Herman Keck Manufacturing Company, hereinafter called the Keck Company, and a Receiver was appointed therefor, an application was also made for the appointment of a Receiver for the Duhme Jewelry Company, hereinafter called the Duhme Company, on the ground, inter alia, that the funds furnished to the organization for the transaction of its business were furnished by the Keck Company, that it was a subsidiary company and a mere department, adjunct, selling agency and instrumentality of the Keck Company, that its

stock was all owned by the latter company and that the two companies were in fact one, and their assets were greatly commingled. The person appointed Receiver of the Keck Company was also designated as Receiver of the Duhme Company. Thereafter the Keck Company was adjudicated a bankrupt and a trustee in bankruptcy was elected.

In May, 1910, after a full hearing, in a controversy between stockholders and creditors, on the facts submitted and the law as found in Re Mumsey Pulp Co., 139 Fed. Rep., 546, Re Reiger, Kapner & Altmark, 157 Fed. Rep. 609, and Re Watertown Pump Co., 169 Fed. Rep., 252, an Opinion was handed down in this court, holding that the Duhme Company was a mere adjunct and asset of the Keck Company. It was affirmatively found that the reorganization and readjustment which took place as between the two companies in 1907 was had because the Duhme Company was a mere department of the Keck Company and because if the Duhme Company should be shown as an asset of the Keck Company, which felt the need of a larger capital, the latter company would have a better credit margin for carrying on its business. There was an inflation of values and an issue of a large amount of additional stock to obtain a larger line of credit. The Receiver was directed to surrender the Duhme Company assets to the trustee in bankruptcy. The proceeds arising from the sale of such assets were ordered to be held separate from those of the Keck Company and applied first to the satisfaction of debts due those who dealt in good faith with
58 the Duhme Company, the surplus, if any, to be applied to the payment of the debts of the Keck Company. An order conforming to the opinion was journalized on June 2, 1910, from which ruling no steps were taken to invoke the judgment of the Appellate Court.

The claim of the Mitchell Store Company, hereinafter called the Mitchell Company, arose after June 30. That company was not a party to any of the above mentioned proceedings.

The Duhme Company, on August 30, 1900, took a lease of certain premises from the Mitchell Company, to expire December 31, 1910, which premises the lessor and the Keck Company jointly occupied until the Receivers above mentioned were appointed. The Receiver and subsequently the trustee in bankruptcy remained in possession of such premises until June 30, 1910, at which times the trustee vacated, and elected, under an order of the court, not to take the lease. The lease to the Duhme Company was made to it alone, in good faith, as a separate and distinct corporation, by the Mitchell Company. The proceeds arising from the sale of the Duhme Company's property are sufficient to pay all its bona fide creditors who dealt with it in ignorance of its ownership by the Keck Company, and to leave a surplus. No dividends have been declared by the creditors of the last named company. The claim of the Mitchell Company is for $6,500 for breach of covenants in the above mentioned lease. On October 8, 1910, that company filed a petition in the state court of Common Pleas praying damages for that amount against the Duhme Company. On the same day the Mitchell Company

filed an application in the referee's court, praying an order directing the trustee in bankruptcy to withhold from distribution, from the Duhme Company's assets, $6,500, until final judgment was rendered in its case then pending in the state court. An order granting the application was made and subsequently vacated, the Mitchell Company appearing in the referee's court to resist the motion to vacate and asking that it be stricken from the files. The referee's rulings are before me for review and by common consent the statement of facts and other papers in that proceedings are considered in this hearing. The Mitchell Company was also by the trustee made a party to the bankruptcy proceedings in the referee's court, served with a subpœna and ordered to set up its claim. It declined to do so and having applied for a judgment on default or otherwise in the state court in its suit there pending, the referee moved
59 this court for an order restraining it from proceeding further in the state court with the prosecution of such suit.

In argument it was asserted by the Mitchell Company that its claim is prior to that of the Keck Company's creditors and that it is entitled to a jury trial and also to select the forum in which it may choose to litigate its claim. The request for injunctive relief made by the trustee is based on the ground that the suit in the state court will interfere with the orderly and speedy course of administration of the bankrupt's estate, that the case may pass through all the state courts and thus greatly delay the closing of the estate, that the bankruptcy court has jurisdiction to the exclusion of the state court, and that the Mitchell Company's rights can be and ought to be worked out in this court.

The Keck Company organized the Duhme Company principally as a selling agency. The Mitchell Company, as an innocent party, in good faith and in ignorance of the fact that the Duhme Company was a part of the Keck Company, executed and delivered to the Duhme Company, a corporate entity, the lease in question. Nevertheless, the Duhme Company was the Keck Company under another name. Its assets were the property of the Keck Company, and after its bona fide debts are paid, the creditors of the Duhme Company are entitled to the surplus proceeds for the satisfaction of their claims. The title to the property of the Duhme Company to the outside world was in that company, but was in fact in the Keck Company and, subject to the rights of the Duhme Company's bona fide creditors, was under the control of the Keck Company. The title to the Duhme Company's property passed to the trustee in bankruptcy as of the date of the adjudication. The money which the Mitchell Company seeks to recover is a part of the bankrupt's assets, in the possession of the bankruptcy court, subject to its control and its order of distribution. The Mitchell Company recognized this fact when it filed a motion in the referee's court for an order directing that so much of the fund in its hands be set aside as may be necessary to pay the judgment, if any, which it may obtain in the state court, and also when it moved to strike the referee's motion from the files and resisted the vacation of the referee's order. Its claim is nominally against the Duhme Company, but, reduced to its

last analysis, is against the bankrupt's estate. The trustee holds the property for whoever may be found rightly entitled to it, and persons claiming the right to share in it may be called upon to come into the bankruptcy court to assert their claims. The creditors are interested in determining the validity of every claim presented against the fund. The property, being in the possession of the bankruptcy court, is withdrawn from the jurisdiction of all other courts, and that court has ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of such property. Murphy v. John Hofman Co., 211 U. S. 562.

It is said in Re Antigo Screen Door Co., 123 Fed. Rep., 249, decided by the seventh Circuit Court of Appeals:

"We take it that any court, whether one of equity, common law, admiralty, or bankruptcy, having in its treasury a fund touching which there is a dispute, may, by virtue of its inherent powers, determine the right to the fund in its possession. Jurisdiction in that respect is an incident of every court. Havens & Geddes Company v. Pierek, Trustee (C. C. A.) 120 Fed. 244; in re McCallum (D. C.) 113 Fed. 393. If otherwise, every court would be subject to the control of the co-ordinate courts, working havoc to the independence of judicial authority. A fund so possessed is in custodia Legis and right to it may only be asserted and determined in the court which possesses it. In re Kellog (D. C.) 113 Fed. 120. See White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1183."

No case has been found on all fours with the one under consideration, but other authorities cited in argument reflecting on the principle involved are Re Swofford Bros. Dry Goods Co., 180 Fed. Rep., 549; Re Gutman, 114 Fed. Rep., 1009; Re McCallum, 113 Fed. Rep., 393; Whitney v. Wenman, 198 U. S., 552; Keegan v. King, 96 Fed. Rep. 758; Re Hornstein, 122 Fed. Rep., 266; Loveland, Bank, Ill.

As *to* the provisions of the bankruptcy act which are invoked in the application, and others of kindred nature, are cited and discussed in some of the cases above mentioned, a review of them will not be undertaken.

That the Mitchell Company may be placed in a favorable position to invite a speedy review of this ruling, a temporary injunction, instead of a restraining order, is granted. The bond is fixed at $750.00.

Since writing the above each party has, in addition to his oral argument, submitted a brief. The Trustee's brief reminds me that he assigned a reason for injunctive relief not named by me above, viz., that the action in the State court constitutes a cloud on the title and possession of the Duhme Company's assets.

The claim that the suit in the state court will not operate to delay the settlement of the bankrupt's estate finds its answer in the
61 fact that it has delayed and is now delaying the proceedings in that respect. A discreet trustee would hardly proceed to disburse a fund with knowledge of an intent on the part of another to assert a claim of considerable size against the fund in his possession.

The purpose of the suit brought by the Mitchell Company in the state court is to lay the foundation of a claim against the Duhme Company's funds, which are a part of the bankrupt's funds. Its motion in the Referee's court that a part of such funds should be set apart to await the action of the state court shows this to be true. The Mitchell Company has entered the bankruptcy court as regards its claim, and even now is prosecuting a petition to review an order of the Referee relating to the retention of the funds to meet the claim, if any, which it may be able to establish. The bankrupt's creditors are entitled to be heard as to whether the Mitchell Company has a claim or not. Neither they nor their representative, the trustee in bankruptcy, are parties in the state suit.

Without a further discussion, the court adheres to the ruling first made.

For convenience, the printed record in the Keck case, filed in the Circuit Court of Appeals, was submitted instead of the original papers on file in this case. The printed record is returned to Mr. Maxwell, but the portions of it submitted were considered by the court in reaching the above result.

Order of Injunction.

Entered Feb. 15, 1911.

In the United States District Court, Southern District of Ohio. Western Division.

No. 4281. In Bankruptcy.

In re THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

Order of Injunction.

This cause came on this day for further hearing on the petition of Robert de V. Carroll, Trustee of the estate of said bankrupt, filed herein on November 23, 1910, the order of Charles T. Greve, Referee, thereon entered on said day, the subpœna issued for the Mitchell Store Building Company on November 28, 1910, and the Marshal's return of service thereof, the motion of said trustee, filed herein December 9, 1910, for an injunction restraining said The Mitchell Store Building Company from proceeding with or continuing the prosecution of the suit brought by it against the Duhme Jewelry Company, in the Common Pleas Court of Hamilton County, Ohio, numbered 146389 on the docket of said court, his affidavit in support thereof, filed herein on the same day, and on the petition of Albert Lorsch, et al., for the appointment of a receiver for
62 said Duhme Jewelry Company, filed herein on February 8, 1909, the order appointing a receiver for said Company entered herein on the same day, the answer of said Herman Keck Manufacturing Company, filed herein on March 25, 1909, the

amended answer of said company filed herein on November 9th 1909, the order adjudging said Herman Keck Manufacturing Company bankrupt, entered herein on December 3, 1909, the opinion of this court filed herein on May 26, 1910, the decree entered herein on June 2, 1910, and on the petition of said Mitchell Store Building Company for a review of certain orders of said Referee, filed herein on November 21, 1910, and the exhibits and papers attached to said petition. On consideration whereof, and the court having heard the arguments of counsel for said trustee and of Mr. P. Lincoln Mitchell, counsel for said The Mitchell Store Building Company, who at the opening of his argument for said company, stated to the court that he appeared for said Company solely for the purpose of objecting to the granting of said injunction and for no other purpose, it is

Ordered and adjudged that said The Mitchell Store Building Company, and its officers, agents, servants and attorneys and each of them, be and they are hereby enjoined until the further order of this court, from proceeding with or continuing in any way the prosecution of said suit No. 146389 brought by it against said The Duhme Jewelry Company in said Common pleas Court of Hamilton County, Ohio, and that a copy of this order be forthwith served by the Marshal upon said The Mitchell Store Building Company, to all of which said Company, by its counsel, excepts.

Petition for Appeal.

Filed Feb. 25, 1911.

United States District Court, Southern District of Ohio, Western Division.

No. 4281. In Bankruptcy.

In re THE HERMAN KECK MANUFACTURING COMPANY,

R. DE V. CARROLL, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, Bankrupt, Plaintiff,

vs.

THE MITCHELL STORE BUILDING COMPANY, a Corporation under the Laws of Ohio, Defendant.

63 *Petition for Appeal.*

The above named defendant, conceiving itself aggrieved by the order made and entered on the 15th day of February, 1911, in the above entitled cause, temporarily enjoining the defendant from the prosecution of a suit against The Duhme Jewelry Company in the Court of Common Pleas of Hamilton County, Ohio, does hereby appeal from said order to the United States Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in the assignment of

errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Cirtuit.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorneys for Defendant.

The foregoing claim of appeal is allowed.

HOWARD C. HOLLISTER,
District Judge.

Assignment of Errors.

Filed Feb. 25, 1911.

United States District Court, Southern District of Ohio, Western Division.

In Bankruptcy. No. 4281.

In re THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

ROBERT DE V. CARROLL, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, Bankrupt, Plaintiff,

vs.

THE MITCHELL STORE BUILDING COMPANY, a corporation under the Laws of Ohio, Defendant.

Assignment of Errors.

And now on the 24th day of February, 1911, comes the above defendant, The Mitchell Store Building Company, by P. Lincoln Mitchell and De Camp & Sutphin, its solicitors, and says that the order of temporary injunction entered in said cause on the 15th day of February, 1911, is erroneous and against the just rights of said defendant, for the following reasons:

One. Said District Court upon the facts presented on the hearing of the motion for said temporary injunction, had no jurisdiction or power to enjoin The Mitchell Store Building Company from
64 the prosecution of its cause of action against The Duhme Jewelry Company in the Court of Common Pleas of Hamilton County, Ohio.

Two. Said District Court erred in granting said temporary injunction upon the pleadings and agreed statement of facts upon which said motion for a temporary injunction was heard.

Wherefore said defendant prays that the said order of temporary injunction entered on February 15, 1911, be reversed and held for naught.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Solicitors for Defendant.

Order Allowing Appeal.

Entered Feb. 25, 1911.

United States District Court, Southern District of Ohio, Western Division.

In the Matter of the KECK MFG. CO., R. DE CARROLL, Trustee,
vs.
MITCHELL STORE BLDG. CO.

This day came the defendant, The Mitchell Store Building Company, and presented its petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Sixth District, and an assignment of errors accompanying the same, which petition upon consideration of the Court is hereby allowed upon the filing of a bond in the sum of Seven Hundred and Fifty Dollars ($750.00) with good and sufficient security to be approved by the Court.

Bond on Appeal.

Filed Feb. 25, 1911.

United States District Court, Southern District of Ohio, Western Division.

No. 4281. In Bankruptcy.

In re THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt.

ROBERT DE V. CARROLL, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, Bankrupt, Plaintiff,
vs.
THE MITCHELL STORE BUILDING COMPANY, a Corporation under the Laws of Ohio, Defendant.

Bond.

Know all men by these presents: That we, The Mitchell Store Building Company, a corporation, as principal, and American Bonding Company of Balto., as sureties, are held and firmly bound unto Robert De V. Carroll, Trustee in Bankruptcy of the estate of The Herman Keck Manufacturing Company, bankrupt, in the full and just sum of Seven Hundred and Fifty ($750.00) Dollars to be paid unto the said Robert De V. Carroll, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, bankrupt, his certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made,

65

we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 25th day of February, in the year of our Lord nineteen hundred and eleven.

Whereas, lately at the District Court of the United States for the Southern District of Ohio, Western Division, in a suit or controversy arising in bankruptcy proceedings in said court, between Robert de V. Carroll, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, bankrupt, plaintiff, and The Mitchell Store Building Company, a corporation, defendant, a temporary injunction was rendered against said The Mitchell Store Building Company, and the said The Mitchell Store Building Company having obtained an appeal and filed a copy thereof in the Clerk's Office of the Court to reverse the order in the aforesaid suit, and a citation directed to the said Robert de V. Carroll, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, bankrupt, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit to be holden at the City of Cincinnati in said Circuit on the 26th day of March next;

Now, the condition of the above obligation is such, that if the said The Mitchell Store Building Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the obligation to be void; else to remain in full force and virtue.

THE MITCHELL STORE BUILDING CO.,
By A. J. REDWAY, *Secretary.*
AMERICAN BONDING CO. OF BALTIMORE,
By JOHN DOYLE, [SEAL.]
Attorney in Fact.

Witness:

P. LINCOLN MITCHELL.
W. H. ELLIS.

Approved by:

HOWARD C. HOLLISTER,
District Judge.

66 *Precipe for Transcript.*

Filed Feb. 25, 1911.

United States District Court, Southern District of Ohio, Western Division.

No. 4281. In Bankruptcy.

In re The Herman Keck Manufacturing Company, Bankrupt.

Robert de V. Carroll, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, Plaintiff,

vs.

The Mitchell Store Building Company, a Corporation under the Laws of Ohio, Defendant.

Præcipe.

To the Clerk:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Sixth Circuit pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

1. Petition of R. deV. Carroll, Trustee of the Estate of said bankrupt filed herein on November 23, 1910.
2. Order of Charles T. Greve, Referee herein, entered November 23, 1910.
3. Subpœna issued for The Mitchell Store Building Co. on November 28, 1910, and the Marshal's return of service thereon.
4. Motion of said Trustee filed herein on December 9, 1910, for an injunction restraining said Mitchell Store Building Co.
5. Affidavit of said Trustee filed December 9, 1910.
6. Petition of Albert Lorsch et al., for the ap-ointment of a Receiver for the Duhme Jewelry Co., filed on February 8, 1909.
7. Order appointing a receiver for said company entered Feb. 8, 1909.
8. Answer of The Herman Keck Manufacturing Company filed on March 25, 1909, with exhibits attached.
9. Amended answer of said company filed on Nov. 9, 1909.
10. Order adjudicating The Herman Keck Manufacturing Co., bankrupt, entered on Dec. 3, 1909.
11. Opinion of this court filed herein on May 26, 1910.

67 12. Decree entered June 2, 1910.

13. Petition of The Mitchell Store Building Company for a review of certain orders of the Referee filed herein on November 21, 1910, and the exhibits and papers attached to said petition.
14. Opinion of Sater J., filed herein Dec. 28, 1910.

15. Order of injunction, dated Feb. 15, 1911, and all papers on appeal.

Respectfully,

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorneys for Appellant.

United States District Court, Southern District of Ohio, Western Division.

No. 4281. In Bankruptcy.

In re THE HERMAN KECK MANUFACTURING COMPANY.

ROBERT DE V. CARROLL, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, Bankrupt, Plaintiff,

vs.

THE MITCHELL STORE BUILDING COMPANY, a Corporation under the Laws of Ohio, Defendant.

I, B. E. Dilley, Clerk of the Court aforesaid do hereby certify that the foregoing Transcript contains a true copy of those portions of the record and proceedings of this Court requested to be copied and sent to the United States Circuit Court of Appeals for the Sixth Circuit by P. Lincoln Mitchell, and DeCamp & Sutphin, Attorneys for The Mitchell Store Building Company, appellant herein, pursuant to a Præcipe filed in this cause on the 25th day of February, A. D., 1911, a copy of which is found on page 94 hereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Cincinnati, Ohio, this 14th day of March, A. D., 1911.

Attest:

[SEAL.]

B. E. DILLEY, *Clerk*,
By HARRY F. RABE, *Deputy*.

68 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To R. De V. Carroll, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Company, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Court, on the* 25th day of March next, pursuant to a Petition for Appeal, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Western Division, wherein The Mitchell Store

Building Company, a corporation under the laws of Ohio, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said Petition for Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 25th day of February, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

HOWARD C. HOLLISTER,
Judge of the District Court of the United States,
for the Southern District of Ohio.

*Not exceeding 30 days from the day of signing.

Cincinnati, Ohio, March 4, 1911.
Service of this citation is hereby acknowledged.

ROBERT DE V. CARROLL,
Trustee in Bankruptcy of the Estate
of The Herman Keck Mfg. Co.,
By MAXWELL & RAMSEY, *Att'ys.*

No. 4281. United States District Court, Southern District of Ohio, Western Division. The Mitchell Store Building Company, a corporation under the laws of Ohio, Appellant, vs. R. De V. Carroll, Trustee in Bankruptcy of the Estate of The Herman Keck Manufacturing Co., Bankrupt, Appellees. Citation on Appeal. P. Lincoln Mitchell and De Camp, & Sutphin, Solicitors for Appellant.

69 And afterwards to-wit on February 27, 1911, præcipe for appearance of counsel was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2161.

In the Matter of the Petition of THE MITCHELL STORE BUILDING Company to Review an Order of the District Court of the United States for the Southern District of Ohio in the Case of The Herman Keck Mfg. Co., Bankrupt.

Frank O. Loveland, Clerk of said Court:

Please enter my appearance as counsel for the Petitioner.

DE CAMP & SUTPHIN.
P. LINCOLN MITCHELL.

And afterwards to-wit on January 12, 1912, an entry was made upon the Journal of said Court clothed in the words and figures as follows:

70 United States Circuit Court of Appeals for the Sixth Circuit.

THE MITCHELL STORE BUILDING CO.
VS.
R. DE V. CARROLL, Trustee in Bankruptcy of The Herman Keck Mfg. Co.

Before Warrington and Knappen, C. J.J. and Killits, D. J.

This cause is argued by Mr. P. Lincoln Mitchell and Mr. Walter A. DeCamp for the Petitioner and Appellant, and by Mr. Joseph L. Lackner and by Mr. Joseph S. Graydon for the Respondent and Appellee and is submitted to the Court.

And afterwards to-wit on February 13, 1912 a decree was entered in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2161.

THE MITCHELL STORE BUILDING CO.
VS.
R. DE V. CARROLL, Trustee in Bankruptcy of The Herman Keck Mfg. Company.

This cause came on to be heard on a petition to review and
71 an appeal from an order made the 15th day of February A.D. 1911, in the Matter of The Herman Keck Manufacturing Company, Bankrupt, by the District Court of the United States for the Southern District of Ohio sitting as a court of Bankruptcy, and was argued by counsel.

On consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the said order of the said District Court be and the same is hereby affirmed with costs.

And on the same day, to-wit February 13, 1912, an opinion was filed in said cause which reads and is as follows:

Opinion.

72 Filed Feb. 13, 1912. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2161.

THE MITCHELL STORE BUILDING COMPANY, Petitioner and Appellant,
v.
R. DE V. CARROLL, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Respondent and Appellee.

Appeal from the District Court for the Southern District of Ohio, Western Division, from an Order Allowing a Temporary Injunction Restraining The Mitchell Store Building Company from Prosecuting an Action in the Court of Common Pleas of Hamilton County, Ohio, Pending the Settlement of the Estate of The Herman Keck Manufacturing Company, Bankrupt. Order affirmed.

Submitted January 14, 1912; Decided February 13, 1912.

Before Warrington and Knappen, Circuit Judges, and Killits, District Judge.

February, 1909, an involuntary petition in bankruptcy was filed in the District Court for the Southern District of Ohio against The Herman Keck Manufacturing Company, a corporation, and at the same time a receiver was asked by the petitioning creditors of the alleged bankrupt for the property and assets of The Duhme Jewelry Company, a corporation, on the ground that the latter com-
73 pany was a mere department and adjunct of the Keck Company, all of its capital stock being owned by the alleged bankrupt and its officers and directors being the same persons who were officers and directors in the same capacity for the Keck Company.

A receiver was appointed under these circumstances for the Duhme Company, which was admittedly solvent. Subsequently, the Keck Company was adjudicated a bankrupt, and a trustee was appointed.

After a hearing upon an issue raised by appropriate pleadings, the court, June 2, 1910, found that "all of the property and assets of The Duhme Jewelry Company * * * was the property of the bankrupt * * * and is now the property of and belongs to * * * the trustee in bankruptcy of The Herman Keck Manufacturing Company," and it was ordered that the "receiver of the property and estate of The Duhme Jewelry Company forthwith turn over" to the trustee in bankruptcy of the bankrupt "all of the property and assets including cash now in his hands as such receiver, and that he keep an account thereof separate and distinct from his account of the balance of the property of said bankrupt."

The Duhme Company had occupied premises rented from The Mitchell Storebuilding Company, the appellant, a corporation, under a lease to expire December 31, 1910. June 30, 1910, by order of the court, the trustee having theretofore converted the property of The Duhme Company into money under the order just referred to, this lease was abandoned, all the rental therefor to that time having been paid.

In October, 1910, the lessor, the appellant brought an action in the Court of Common Pleas of Hamilton County, Ohio, against The Duhme Jewelry Company, and no other defendant, in two causes of action, to recover damages for alteration and waste in the premises and for loss of rentals occasioned by the abandonment of the lease, and at the same time the appellant applied to the District Court in the bankruptcy proceeding setting forth the fact that it had brought an action in the State Court against The Duhme Jewelry Company and asking "for an order directing the trustee of The Keck Manufacturing Company, bankrupt, to withhold from the distribution of the assets of The Duhme Jewelry Company the sum of $6,500.00
74 until final judgment is rendered in said suit." An order to this effect was issued by the referee but subsequently, on motion of the trustee, it was vacated, The Mitchell Storebuilding Company, appellant herein, appearing again before the referee in the bankruptcy proceeding with a motion to strike from the files the trustee's motion to vacate the aforesaid order of impounding. From the action of the referee in vacating the order of impounding the appellant is prosecuting review in the District Court.

Thereupon the trustee applied by petition to the referee for an order making The Mitchell Storebuilding Company a party to the bankruptcy proceeding. The ground of this petition was that the suit of The Mitchell Storebuilding Company in the State Court was a cloud upon the title and possession of the trustee of the assets of The Duhme Company and a hindrance to the speedy settlement of the bankrupt's estate, and that it was necessary for speedy and proper distribution of the assets of the estate to make The Mitchell Storebuilding Company a party to the bankruptcy proceedings. An order as petitioned for was entered and subpœna issued and served upon The Mitchell Company and returned.

Thereupon the trustee prayed an injunction from the District Court restraining the appellant from prosecuting its suit in the state court pending the settlement of the bankrupt's estate, The Mitchell Company at that time threatening to take a judgment in the state court by default. To this application, and apparently in response to the subpœna, for it nowhere objected to the attempt to make it a party to the bankruptcy proceedings, the appellant appeared, and from an order granted therein allowing a temporary injunction this appeal is prosecuted. At no time has the trustee in bankruptcy been made a party to the proceedings in the state court.

KILLITS, *District Judge* (after stating the facts as above):

We begin the consideration of the proposition raised by the appeal with the assumption that the assets of The Duhme Jewelry

Company are property in the hands of the trustee in bankruptcy by virtue of the order of the District Court issued before the commencement of appellant's action in the state court. Were
75 we inclined to question the right of the District Court to so dispose of The Duhme property, which we have not considered, that issue is not before us in any form and cannot be raised by appellant. It recognized the matter as closed when it voluntarily came into the District Court to ask that it might have sufficient of the assets so acquired by the court of bankruptcy impounded to meet its anticipated judgment.

The record affords The Mitchell Storebuilding Company no opportunity to controvert that, at the time it was enjoined, the res out of which it might ask for payment of any valid claim against The Duhme Company was properly in the possession of the trustee in bankruptcy. The Supreme Court, in Whitney v. Wenman, 198 U. S. 539, 552, say:

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent or character of liens thereon or rights therein."

The question, then, before us is whether the record suggests the existence of a controversy which may relate to the disposition of property in the custody of the bankruptcy court as belonging to the bankrupt's estate. It is conceded that the surplus of the Duhme assets above the indebtedness of this solvent corporation go to swell the fund for distribution to the creditors of The Keck Company, and are to be distributed in the final settlement of the bankrupt's estate. The situation, then, invites consideration of section 2 of the bankruptcy act, providing "that the courts of bankruptcy * * * are hereby invested * * * with such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to (15) make such orders,
76 issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

On behalf of the appellant it is contended that the facts cannot be brought within this provision and that the progress of its case to judgment in the state court cannot in any way interfere with the settlement of the bankrupt's estate. In attempting to meet this contention of the appellant the fact must not be overlooked that The Mitchell Storebuilding Company was about to take a judgment by default and that the injunction does nothing more than to prevent a judgment in the state court until the termination of the bankruptcy proceeding. The writ does not attempt to enjoin the final

prosecution of the claim in the state court, and the inquiry is, then, what would have been the effect had the writ not been issued and a default judgment had been permitted to the appellant. Unquestionably, under these circumstances, the appellant might present a liquidated claim for the amount of its judgment and costs to the referee, who, in such event, would be compelled to meet the question of its allowance or rejection. It seems to us that the statement of this fact determines this appeal. It is obvious that the amount and extent of such possible judgment was of interest to the trustee representing the creditors, because it would affect the amount of the Duhme assets available to the payment of the claims of creditors of the bankrupt.

At the time the injunction was sought the alternatives then before the trustee were, to suffer a suit in which he was not a party to determine in some measure the amount available to him to distribute to creditors, or to go into the state court and litigate with the appellant the amount and validity of its unliquidated claim that he might protect moneys in his hands as assets of his bankrupt. Plainly, the trustee could not be suffered to abdicate his right as a representative of the creditors to contest this claim, and to permit him to become a party to the action in the state court not only would be to compel the settlement of the bankrupt's estate to endure such delays as were incident to the state practice but would be also to reverse the precedence which the bankruptcy courts, respecting matters within their jurisdiction, have over the state courts. We see
77 in the proposition before us a common example of situations which that portion of the act quoted was designed to affect. This provision must be given a free interpretation as conveying "broad powers" upon the bankruptcy court "to cause the estate of the bankrupt to be collected, reduced to money and distributed and to determine otherwise in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy; that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein." (Whitney v. Wenman, 198 U. S. 539, 552; Murphy v. John Hofman Co., 211 U. S. 562; In re McMahon, 147 Fed. 684.)

This proposition is neither peculiar to the bankruptcy practice nor dependent altogether upon the provisions of the bankruptcy act quoted above.

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during continuance of its possession

has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. Those principles are of general application and not peculiar to the relations of the courts of the United States to the courts of the States; they are, however, of especial importance with respect to the relations of those courts, which exercise independent jurisdiction in the same territory, often over the same property, persons, and controversies; they are not based upon any supposed superiority of one court over the others, but serve to prevent a conflict over the possession of property, which would be unseemly and subversive of justice." (Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 54.)

The inquiry, then, is whether a default judgment or a contest in the state court might have disturbed "the possession of the property while it is in the custody of the court which has seized it," that is, the bankruptcy court. Independent of the suggestion which we have made above on this subject, appellant answered the question for itself when it entered the bankruptcy court for the purpose of having impounded the fund. That action not only evinced an ambition to participate in that fund but it was of such a character as to suggest to a discreet trustee and a careful court the inadvisability of distributing the assets of the estate until it were seen that the trustee, as the representative of the Keck creditors, was protected. This, at least, involved delay in the settlement of the bankrupt's estate; wherefore the embarrassment due to the unrestrained or contested proceedings in the state court is obvious.

Appellant seems not to question that it is a party to the bankruptcy proceeding, which relation was effected, if not by its voluntary appearance with its motion to impound, certainly by its subsequent appearance to resist the application for a temporary injunction after a subpœna on it had by order of the referee been served on it upon application of the trustee to make it a party.

The right to make it a party would seem clear under section 2 (6), wherein authority is given to the court to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy." Assuming, as we must, for the purposes of this case, that the adjudication of the District Court was correct in holding the Duhme Company to be merely an adjunct of the Keck Company and the Duhme Company's property to be subject to administration as part of the assets of the Keck Company, we find the appellant without protest submitting to a jurisdiction which had full power to liquidate its claim against the fund in the possession of the trustee. Its two rights of action would manifestly be urged to be within the description of provable claims against the bankrupt under section

63-*a*, and, therefore, protected by the provisions of section
79 63-*b* that "unliquidated claims against the bankrupt may pursuant to application to the court be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate." That this language suffices to afford to appellant, on application to the court, an opportunity for the liquidation of its claim in a plenary action seems to be clear.

So long, therefore, as appellant stood in a position to demand satisfaction of its claim against the Duhme Company out of the moneys in the hands of the trustee, the threatened default judgment would be an interference with the proper administration of the bankruptcy estate.

We think this temporary injunction, if not the response to a plain duty, was clearly in the exercise of a sound discretion resting in the District Court. (Buffington v. Harvey, 95 U. S. 99; City of Shelbyville v. Glover, 184 Fed. 234, 238, C. C. A. 6th Cir.)

The order appealed from will be affirmed.

80 And afterwards towit on March 4, 1912, a petition for appeal was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2161.

THE MITCHELL STORE BUILDING COMPANY, a Corporation under the Laws of Ohio, Appellant,

vs.

R. DE V. CARROLL, Trustee in Bankrutcy of The Herman Keck Manufacturing Company, Bankrupt, Appellee.

Petition for Appeal to the Supreme Court of the United States.

The above mentioned appellant, The Mitchell Store Building Company, a corporation organized under the laws of the State of Ohio, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has therein been rendered on the 13th day of February, A. D. 1912, affirming the decree of the District Court of the United States for the Southern District of Ohio, and that the matter in controversy in said suit exceeds One Thousand ($1,000.00) Dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Sixth Cir-
81 cuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors

complained of in the assignment of errors herewith filed by the said appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorneys for Appellant.

It is hereby ordered this — day of ——, 1912, that the appeal in the above entitled case to the Supreme Court of the United States be and it is hereby allowed as prayed.

——— ———,
United States Circuit Judge, Sixth Circuit.

82 And on the same day, towit, March 4, 1912, an assignment of errors was filed in said cause which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 2161.

THE MITCHELL STORE BUILDING COMPANY, a Corporation under the Laws of Ohio, Appellant,

vs.

R. DE V. CARROLL, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Appellee.

Assignment of Errors.

And now comes the appellant, The Mitchell Store Building Company, in connection with its petition for appeal herein, and presents and files herewith its assignment of errors and says that in the record, proceedings and decree of the United States Circuit Court of Appeals of the Sixth Circuit there is manifest error in this, to wit:

1. In holding and deciding that the District Court of the United States for the Southern District of Ohio, had jurisdiction and power to enjoin the appellant from the prosecution of its cause of action against The Duhme Jewelry Company in the Court of Common Pleas of Hamilton County, Ohio.

83 2. In holding and deciding that the District Court of the United States for the Southern District of Ohio properly enjoined the appellant upon the facts presented to it on the hearing of the application for an injunction against the prosecution of appellant's cause of action in the Common Pleas Court of Hamilton County, Ohio.

3. In holding and deciding that the action of said District Court in granting said injunction was within its discretionary power.

4. In holding and deciding that the suit brought by appellant in the Court of Common Pleas of Hamilton County, Ohio, against the Duhme Jewelry Company, was an interference with the administration of the bankrupt's estate and constituted a cloud upon

the title and possession of the assets of the bankrupt and a hindrance to the speedy and proper distribution of the estate of said bankrupt.

Wherefore, the appellant prays that the said judgment and decree of said Circuit Court of Appeals may be reversed.

P. LINCOLN MITCHELL,
DE CAMP & SUTPHIN,
Attorneys for Appellant.

84 And on the same day, towit March 4 1912, an order allowing the appeal in this cause was entered clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2161.

THE MITCHELL STORE BUILDING CO., Appellant,
vs.
R. DE V. CARROLL, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Bankrupt, Appellee.

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be and it is hereby allowed as prayed and the bond is hereby fixed in the sum of $500.00.

J. W. WARRINGTON,
Circuit Judge.

And afterwards towit on March 5, 1912, bond on appeal in said cause was filed which reads and is as follows:

85 United States Circuit Court of Appeals for the Sixth Circuit.

THE MITCHELL STORE BUILDING COMPANY, a Corporation under the Laws of Ohio, Appellant,
vs.
R. DE V. CARROLL, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Bankrupt, Appellee.

Bond on Appeal.

Know All Men By These Presents That we, The Mitchell Store Building Company, a corporation under the laws of Ohio as principal and the American Bonding Company as surety, are held and firmly bound unto R. de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Bankrupt, in the sum of Five Hundred ($500.00) Dollars to be paid to the said R. de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Bankrupt, or his successor, to which payment well

and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents. Sealed with our seal- and dated this 5th day of March 1912.

Whereas the appellant in the above entitled suit has prose-
86 cuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Sixth Circuit on the 13th day of February, 1912.

Now, Therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make its plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

THE MITCHELL STORE BUILDING CO.,
By A. J. REDWAY, *Sec'y & Treas.*
AMERICAN BONDING COMPANY OF BALTIMORE,
By JOHN DOYLE, *Attorney in Fact.*

The foregoing bond is approved this 5th day of March A. D. 1912 to operate as a supersedeas.

J. W. WARRINGTON,
United States Circuit Judge, Sixth Circuit.

87 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of The Mitchell Store Building Company vs. R. de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Co., Bankrupt, No. 2161, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 9th day of March A. D. 1912.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit,
By ARTHUR B. MUSSMAN,
Deputy Clerk.

88 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To R. de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein The Mitchell Store Building Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John W. Warrington, judge of the United States Circuit Court of Appeals for the Sixth Circuit this 5th day of March, A. D. 1912.

J. W. WARRINGTON,
Judge United States Circuit Court of Appeals, Sixth Circuit.

CINCINNATI, OHIO, *March 7th*, 1912.

Service of this citation is hereby acknowledged.
ROB'T DE V. CARROLL, *Trustee,*
By MAXWELL & RAMSEY, *Att'ys.*
L.

89 [Endorsed:] No. 2161. Citation. Filed Mar. 7, 1912. Frank O. Loveland, Clerk.

Endorsed on cover: File No. 23,101. U. S. Circuit Court Appeals, 6th Circuit. Term No. 581. The Mitchell Store Building Company, appellant, vs. R. de V. Carroll, trustee in bankruptcy of The Herman Keck Manufacturing Company, bankrupt. Filed March 18th, 1912. File No. 23,101.

10

Office Supreme Court, U. S.
FILED.
FEB 13 1913
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 591 212

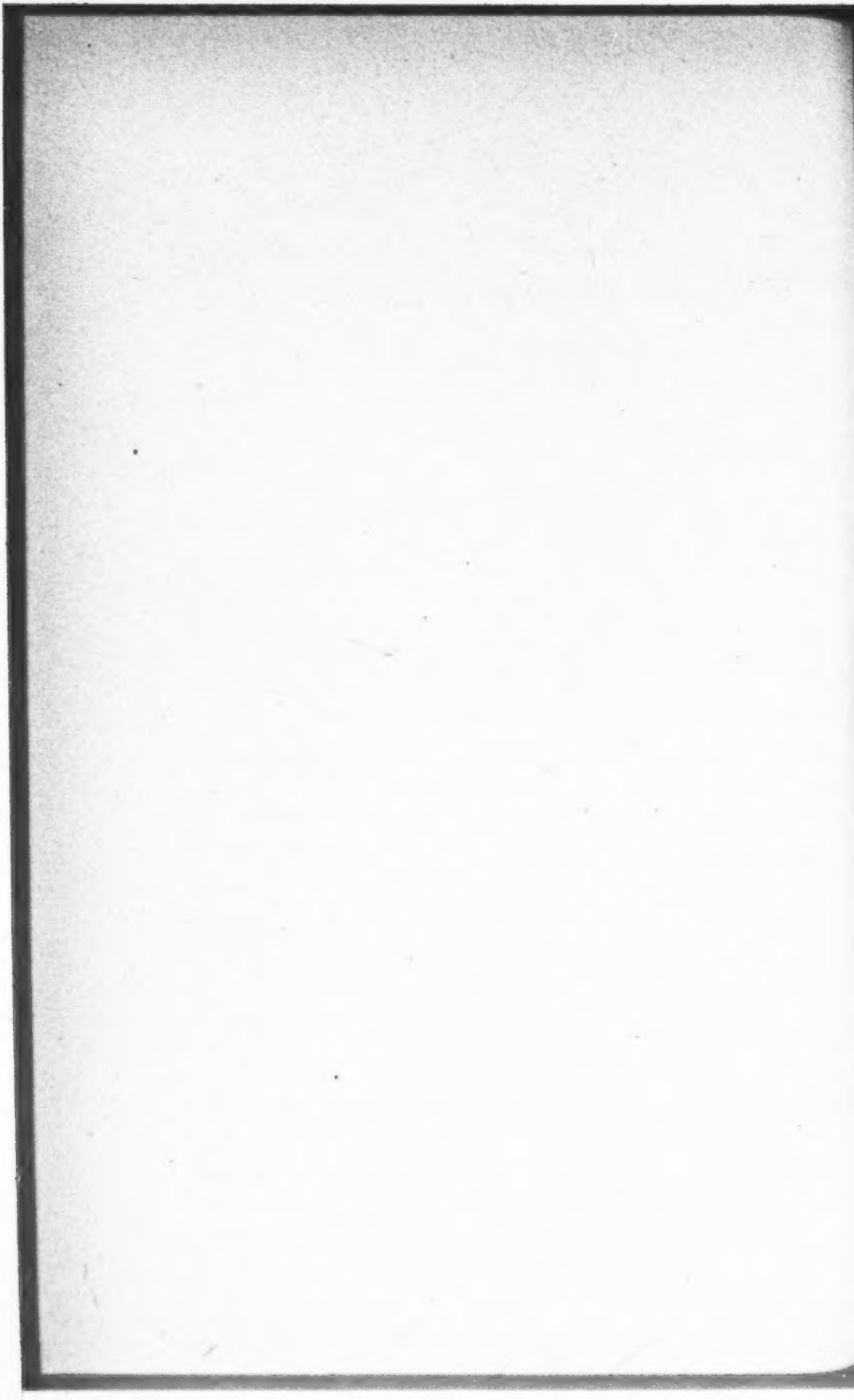
THE MITCHELL STORE BUILDING COMPANY,
APPELLANT AND PETITIONER,

vs.

R. DE V. CARROLL, TRUSTEE IN BANKRUPTCY OF THE HERMAN KECK MANUFACTURING COMPANY, BANKRUPT.

MOTION AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WALTER A. DE CAMP,
P. LINCOLN MITCHELL,
Counsel for Appellant-Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 581.

THE MITCHELL STORE BUILDING COMPANY, A CORPORATION UNDER THE LAWS OF OHIO, PETITIONER,

vs.

R. DE V. CARROLL, TRUSTEE IN BANKRUPTCY OF THE HERMAN KECK MANUFACTURING COMPANY, BANKRUPT, RESPONDENT.

MOTION FOR WRIT OF CERTIORARI.

Now comes The Mitchell Store Building Company, by P. Lincoln Mitchell, its counsel, and moves this honorable court that it shall, by certiorari or other proper process directed to the honorable the judge of the United States Circuit Court of Appeals for the Sixth Circuit, require said court to certify to this court for its review and determination a certain cause in said Court of Appeals lately pending wherein the respondent, R. de V. Carroll, trustee in bankruptcy of The Herman Keck Manufacturing Company, was respondent and appellee and your petitioner, The Mitchell Store Building Company, was petitioner and appellant.

P. LINCOLN MITCHELL, *Counsel.*

[Endorsed:] No. 581. The Supreme Court of the United States. The Mitchell Store Building Company, a corporation under the laws of Ohio, Petitioner, *vs.* R. de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Bankrupt, Respondent. Motion for Writ of Certiorari. P. Lincoln Mitchell, Counsel.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 581.

THE MITCHELL STORE BUILDING COMPANY, A CORPORATION UNDER THE LAWS OF OHIO, PETITIONER,

vs.

R. DE V. CARROLL, TRUSTEE IN BANKRUPTCY OF THE HERMAN KECK MANUFACTURING COMPANY, BANKRUPT, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The Mitchell Store Building Company respectfully shows to this honorable court as follows:

The Mitchell Store Building Company, a corporation under Ohio laws, was the owner of certain premises on Fourth street, Cincinnati, Ohio, and on August 30, 1900, executed a written lease thereof to The Duhme Jewelry Company, an Ohio corporation, organized to engage in the retail jewelry business, the obligations of the lessee being individually guaranteed by the president and one of the stockholders of the lessee company. This lease was for a term of ten (10) years and two (2) months, expiring December 31, 1910. The lessee went into possession of the premises and conducted a retail jewelry business therein for many years. This lessee is and always has been a perfectly solvent corporation and has never been adjudicated a bankrupt.

The bankrupt in this case is The Herman Keck Manufacturing Company, which was a separate and distinct cor-

poration from The Duhme Jewelry Company. It was engaged in the manufacture of jewelry. Under some arrangement with The Duhme Jewelry Company, lessee, it occupied a portion of the leased premises and became insolvent.

Certain of its creditors filed a petition in bankruptcy against it on February 8, 1909, in the District Court for the Southern District of Ohio, and pending adjudication obtained a temporary receiver for its assets. At the same time, in the same bankruptcy proceedings, the petitioning creditors also asked that a receiver be appointed for the assets of The Duhme Jewelry Company, the lessee, although no charges of bankruptcy were filed against it, the ground of the application being that The Duhme Jewelry Company was a department or selling agency of The Keck Manufacturing Company, the alleged bankrupt. Thereupon a temporary receiver was appointed for the assets of the solvent Duhme Jewelry Company.

At the date when these proceedings occurred, February 8, 1909, there was no rental due the lessor from The Duhme Jewelry Company, the same having been paid in full to that date, and the lessor was in no wise a party to the above proceedings in bankruptcy.

The temporary receiver of The Duhme Jewelry Company, lessee, continued to pay the rental reserved under the lease until the premises were finally vacated on June 30, 1910.

In the bankruptcy proceedings against The Keck Manufacturing Company there was a protracted trial upon the issue raised by the answer of that company, and finally an adjudication in bankruptcy was made on December 3, 1909, and the respondent Carroll was duly elected trustee of said bankrupt; but the assets of The Duhme Jewelry Company still remained in the hands of the receiver which had been appointed by the bankruptcy court, February 8, 1909. This receiver, under orders of court, reduced to cash the assets of the lessee which came into his possession, and subsequently the trustee of the bankrupt petitioned the district

court to authorize him to take possession of the cash and property in the hands of the receiver of the lessee, repeating the allegation that they were real assets belonging to the bankrupt estate because the bankrupt corporation had owned most of the stock of the lessee company and had conducted it as a selling agency for the purpose of disposing of its manufactured output. Certain stockholders of the lessee company objected, but after a hearing had been had the district court ordered the receiver of the lessee's assets to turn all the property over to the trustee of the bankrupt and directed the trustee to keep the fund in a separate account apart from the assets of the bankrupt. This decree was entered on June 2, 1910, and your petitioner was in no wise a party to the proceedings relative to this transfer of assets, the rental under the lease having been regularly paid by the receiver of the lessee company from February 8, 1909.

On June 9, 1910, the trustee of the bankrupt, by an order entered on that date, elected not to assume the leasehold estate, which had about six months to run, until its expiration, and thereupon vacated the premises on June 30, 1910, all the rental due under the lease having been paid up to that time.

The lessee, The Duhme Jewelry Company, did not resume possession of the premises, but, on the contrary, abandoned the same and declined to pay the monthly rental under the lease from July 1, 1910, to the end of the term; and thereupon the lessor commenced an action against the lessee in the Court of Common Pleas of Hamilton county, Ohio, on October 8, 1910, to recover a personal judgment against the lessee for the sum of sixty-five hundred ($6500.00) dollars for alleged waste and for rental which had accrued since June 30, 1910, when the premises had been vacated by the trustee in bankruptcy.

Your petitioner, the lessor, having no claim against The Herman Keck Manufacturing Company, the bankrupt, and having no claim provable in bankruptcy, had never ap-

peared in the bankruptcy proceedings and had never been concerned with the administration of the bankrupt estate. Your petitioner caused service of summons to be made upon the lessee in the suit pending in the State court, and also notified the trustee of the bankrupt and the bankruptcy court that it was seeking to establish its claim against the lessee and requested the bankruptcy court to withhold from distribution to the creditors of the bankrupt the amount of its claim, which was sixty-five hundred ($6500.00) dollars, until the suit in the State court had been determined. This request was denied by the bankruptcy court, to which your petitioner filed a petition to review.

At this time the trustee in bankruptcy had in his possession about fifty thousand ($50,000.00) dollars in cash which had been derived from the sale of the lessee's assets and which was more than sufficient to pay all claims against the lessee, including the full amount of the claim which your petitioner asserted.

After the State court had acquired jurisdiction of the suit against the bankrupt and your petitioner was proceeding to the trial and hearing thereof, the trustee in bankruptcy, on November 23, 1910, filed in the bankruptcy court an application to have your petitioner made a party to the bankruptcy proceedings, alleging that the suit in the State court constituted a cloud on the title and possession of the cash in his hands which had been derived from the sale of the Duhme Company's assets, and stating that it was necessary for the complete determination of your petitioner's claim and for a speedy and proper distribution of the Duhme Company's assets to the creditors of the bankrupt that your petitioner should be made a party and praying that your petitioner be made a party and ordered to set up whatever claim it might have against the property in the hands of the trustee. An order was entered on the same day making your petitioner a party and ordering it to set up whatever

claim it might have against The Duhme Jewelry Company or its assets in the hands of the trustee, and a writ of subpœna was served upon your petitioner to answer by the first Monday in February, 1911.

Before the time for answer to these proceedings and while your petitioner was prosecuting its suit in the State court, the trustee, on December 9, 1910, filed a petition in the district court for an injunction against your petitioner to restrain it from prosecuting its action in the State court, alleging that your petitioner proposed to obtain a judgment against the lessee and file the same in the bankruptcy court as a preferred claim or lien upon the assets of The Duhme Jewelry Company in the hands of the trustee of the bankrupt. As The Duhme Jewelry Company was not in bankruptcy, although some of its assets had been placed in the bankruptcy court, and as it had not been dissolved and your petitioner had no provable claim against the bankrupt and was simply prosecuting an action *in personam* against the lessee for rentals which had accrued under the lease subsequent to the time when the trustee in bankruptcy had vacated the premises, your petitioner was proceeding to trial in the State court when it was advised of this petition for an injunction and thereupon by its counsel appeared solely for the purpose of objecting to the issuance of the writ; but the district judge, upon the hearing upon the agreed statement of facts, granted the prayer for an injunction and restrained your petitioner and its attorneys, agents and officers from further proceeding with or continuing in any way the prosecution of the action in the State court.

Your petitioner appealed this cause to the Circuit Court of Appeals for the Sixth Circuit, where the matter was duly argued and submitted to said court, which affirmed the order of injunction on February 13, 1912.

Thereupon your petitioner was allowed an appeal to this honorable court under section 6 of the act of March 3, 1891, and its appeal was docketed in this court in March, 1912,

and as some question might arise as to the method of reviewing the order of the Circuit Court of Appeals in this cause, your petitioner has prepared this petition for a writ of certiorari under section — of said act of March 3, 1891, to avoid any jurisdictional question arising upon the said appeal.

A certified copy of the entire record of said cause in the Circuit Court of Appeals for the Sixth Circuit is herewith furnished as a part of this application, in conformity with rule No. 37 of this honorable court relative to cases upon writs of certiorari from the Circuit Court of Appeals.

Upon this foregoing statement and the record in this cause your petitioner submits the following reasons why the judgment of said Circuit Court of Appeals affirming the judgment of the District Court for the Southern District of Ohio, is erroneous and should be brought here for review by this court:

1. Because no jurisdiction is conferred upon courts of bankruptcy under the act of July 1, 1898, nor does such jurisdiction exist as matter of inherent right in said courts, to enjoin on interfere with the prosecution of the suit *in personam* in the State court by your petitioner against The Duhme Jewelry Company, the lessee, which had not been adjudicated a bankrupt and was still liable to your petitioner upon the terms of its lease.

2. The effect of the decree of the Circuit Court of Appeals and of the district court, if they are permitted to stand, would be to deprive the courts of the several States of jurisdiction and power to entertain causes of action upon claims which were not provable in bankruptcy where the only object of said suits was to obtain a judgment *in personam* and where such suits could have no possible effect upon the administration of the bankruptcy law by the Federal court or upon the administration of the assets in its possession and control.

3. Because the exercise of the power of injunction exhibited in this cause was contrary to the provisions of section 720 of the Revised Statutes of the United States, inasmuch as the law relating to proceedings in bankruptcy passed July 1, 1898, does not authorize such an injunction to be issued.

4. Because the action pending in the State court was no interference with the possession and custody of the assets in the hands of the bankruptcy court.

5. Because the jurisdiction of the State court to adjudicate upon the liability of the lessee to the lessor was a jurisdiction concurrent with that of the bankruptcy court to adjudicate the same question in disposing of the property of the lessee in its possession and control, and being a concurrent jurisdiction its exercise could not be forbidden by a writ of injunction from the Federal court.

6. Because the suit in the State court was not founded upon a claim against the bankrupt, and was not one from which a discharge in bankruptcy would be a release, and therefore could not be stayed by an injunction issued under section 11 of the bankruptcy act.

7. Because the writ of injunction, which was issued from the Federal court, was not "necessary for the enforcement of the provisions of the act" under section 2, clause 15, of the bankruptcy act.

8. Because the judgment of the Circuit Court of Appeals has deprived your petitioner of the right to sue its debtor in an action *in personam* and in the forum of its own choice in a case where the debtor has not been adjudged a bankrupt, is perfectly solvent, and has no proceedings in bankruptcy which are pending against it.

9. The judgment of the Circuit Court of Appeals has deprived your petitioner of its right to have a trial by jury in the action *in personam* brought by it in the State court, and if the injunction is permitted to stand has compelled your petitioner to submit the merits of its claim to the bankruptcy court upon a petition and order to show cause issued thereon,

and thereby has deprived your petitioner of such trial by jury as matter of right, and by compelling your petitioner to propound its claim in the bankruptcy court alone, and in no other court, so as to become entitled to share in the lessee's assets in the hands of that court, it has deprived your petitioner of the conclusive effect of a judgment in its favor against the lessee company, if such were obtained, which it would be entitled to in subsequent proceedings against the individual guarantors who signed said lease.

10. Because the claim of your petitioner upon which the action *in personam* was brought in the State court was not in existence when proceedings in bankruptcy were instituted against the bankrupt, and your petitioner's claim against the lessee company, which is not a bankrupt, did not arise until after the bankruptcy court had abandoned and vacated the leased premises and parted with all control thereof.

11. Because inasmuch as the bankruptcy court has no power to enjoin a lessor from suing the bankrupt in an action *in personam* upon the covenant to pay rental under a lease where there was no rental due at the time of the filing of the petition in bankruptcy and where the trustee has elected not to assume the leasehold estate, so *a fortiori* the bankruptcy court has no power to enjoin a suit by the landlord against a third person, lessee, who was not bankrupt, upon demands relating to the unexpired portion of the lease.

12. Because the effect of this injunction not only gives to the court of bankruptcy exclusive jurisdiction of the possession and control of the property in its hands, but at the same time takes away from the State courts absolutely the right to decide any issue of fact or law which might arise also in the bankruptcy court in decreeing the disposition of property in its custody, thereby vesting in the courts of bankruptcy not only exclusive possession of the *res*, but exclusive jurisdiction to decide the questions involving the disposition of the *res*, which latter exclusive jurisdiction was

not conferred upon the bankruptcy courts by the act of July 1, 1898.

Your petitioner believes that the aforesaid judgment and decree of the Circuit Court of Appeals for the Sixth Circuit is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the act of Congress in such cases made and provided.

Wherefore your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled The Mitchell Store Building Company, petitioner and appellant, against R. de V. Carroll, trustee in bankruptcy of The Herman Keck Manufacturing Company, bankrupt, respondent and appellee, number 2161, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof may be reversed by this honorable court.

And your petitioner will ever pray.

THE MITCHELL STORE BUILDING COMPANY, *Petitioner*,
By P. LINCOLN MITCHELL AND
DE CAMP & SUTPHIN, *Attorneys*.

P. LINCOLN MITCHELL,
Counsel for Petitioner.

STATE OF OHIO,
Hamilton County, ss:

P. Lincoln Mitchell, being first duly sworn, deposes and says that he is counsel for the petitioner herein; that he has prepared the foregoing petition and that the allegations therein are true as he verily believes.

P. LINCOLN MITCHELL.

Sworn to before me and subscribed in my presence this 11th day of April, 1912.

[Notarial Seal, Hamilton County, Ohio.]

CARL M. JACOBS, JR.,
Notary Public in and for Hamilton County, Ohio.

[Endorsed:] No. 581. The Supreme Court of the United States. The Mitchell Store Building Company, a corporation under the laws of Ohio, Petitioner, *vs.* R. de V. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, Bankrupt, Respondent. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. P. Lincoln Mitchell, De Camp & Sutphin, Att'ys for Petitioner.

[Endorsed:] File No. 23,101. Supreme Court U. S. October Term, 1912. Term No. 581. The Mitchell Store Building Co., Appellant, *vs.* R. de V. Carroll, Trustee, etc. Motion and petition for writ of certiorari. Filed February 13, 1913.

No. 212

United States Supreme Court

THE MITCHELL STORE BUILDING COMPANY,

Petitioner and Appellant,

vs.

R. De V. CARROLL, Trustee in Bankruptcy of The Harmon Knox Manufacturing Company, Bankrupt,

Respondent and Appellee.

Brief of Petitioner and Appellant

P. KINGSLEY MITCHELL,
Jackson, Mississippi,
Attorney for Petitioner and Appellant.

Brief Made Public Upon Entry Into Court, October Term, 1940.

United States Supreme Court.

THE MITCHELL STORE BUILDING COMPANY,
Petitioner and Appellant,

No. ——. *vs.*

R. De V. CARROLL, Trustee in Bankruptcy of The Herman Keck Maufacturing Company, Bankrupt,
Respondent and Appellee.

Brief of Petitioner and Appellant.

STATEMENT OF FACT.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Sixth Circuit affirming an order of the District Court of the United States for the Southern District of Ohio, in Bankruptcy, enjoining this petitioner and appellant from prosecuting a suit in a state court. The case is also presented on petition for writ of *certiorari*.

The case briefly stated is as follows, as appears from the agreed statement of facts (Record, page 33), and the petition of the Mitchell Store Building Company for review (Record, page 1).

(*a*). The Mitchell Store Building Company, an Ohio corporation, has filed a suit in the state court against the Duhme Jewelry Company, an Ohio corporation, for sixty-five hundred ($6,500.00) dollars for breaches of covenants of a lease of premises at Nos. 19 to 25 West Fourth street, Cincinnati, made by the Mitchell Company to the Duhme Company. A copy of the petition filed in that suit appears at page 39 of the Record. Service of summons was obtained upon the defendant, the Duhme Jewelry Company.

(*b*). All of the capital stock of the Duhme Jewelry Company, which is a solvent corporation, is owned by the Keck Manufacturing Company, which is a bankrupt, its estate at the present time being administered in bankruptcy in the District Court below.

(*c*). The creditors of the bankrupt Keck Manufacturing Company, on February 8, 1909, had a receiver appointed for the solvent Duhme Jewelry Company. This receiver administered the estate of the Duhme Jewelry Company for over a year until June 2, 1910, when upon application of said receiver and the trustee of the bankrupt Keck Company, all the property and assets of the solvent Duhme Jewelry Company were, by order of the District Court, transferred to the trustee of the bankrupt Keck Manufacturing Company. All of these assets have been reduced to cash, which is more than sufficient to pay all the known debts of the Duhme Jewelry Company. There are at the present time no further assets of the Duhme Jewelry Company other than the cash above mentioned. This cash, by reason of the order of

June 2d above referred to, is not in the hands of the receiver of the Duhme Jewelry Company subject to the payment of the debts of the Duhme Jewelry Company, but, as a result of said order, is in the hands of the trustee of the bankrupt Keck Manufacturing Company.

The Mitchell Store Building Company was not a party to any of the proceedings in the receivership of the Duhme Jewelry Company, or in the bankruptcy of the Keck Manufacturing Company, and was not a party to the proceeding by which the assets of the Duhme Jewelry Company were turned over to the trustee of the Keck Manufacturing Company. The Mitchell Company could not have been a party, for the reason that its claim did not arise until the covenants of the lease were broken, which occurred in July, 1910, one month after the order transferring the assets had been made and the assets turned over.

On July 1st, 1910, the receiver of the Duhme Jewelry Company having up to that date paid all rent due the Mitchell Company during his occupancy and having elected not to assume the leasehold as an asset of the Duhme Company, vacated the premises. All rent due the Mitchell Company by the Duhme Company and by the receiver had been paid in full up to said date, July 1st, 1910.

(*d*). At the time the suit of the Mitchell Store Building Company was filed against the Duhme Jewelry Company, in the state court, on October 8, 1910, the Mitchell Store Building Company notified the trustee of the Keck Manufacturing Company of this fact and filed an application with the referee, asking him to withhold from the distribution of the cash in the trustee's hands belonging to the Duhme Jewelry Company, the amount sued on in the state Court, until that suit could be determined in the state court. This application was granted by the

referee with the consent of the trustee of the Keck Manufacturing Company (Record, page 47), but was later stricken from the files, for the reasons mentioned by the referee in an order refusing the application of the Mitchell Co. (Record, page 37). A petition to review this order of the referee was then filed by the Mitchell Store Building Company, which was subsequently heard but has not yet been determined by the District Court. In the meantime, on November 23, 1910 (Record, page 5), the trustee of the Keck Manufacturing Company filed a petition with the referee asking that the Mitchell Store Building Company be brought in and made a party to the bankruptcy proceedings. On the same day the Mitchell Company not appearing, the referee entered an order reciting the making of the Mitchell Store Building Company a party in the bankruptcy proceedings. Thereafter, and before answer was required to said petition the trustee of the Keck Manufacturing Company on December 9, 1910, filed a motion in the District Court, to which was attached an affidavit, Record, page 9, asking that court to restrain the Mitchell Store Building Company from proceeding with its suit in the state court. On February 15, 1911, an order was entered by the District Court, granting the injunction on the ground that the suit of the Mitchell Company in the state court was an interference with the administration of the bankrupt estate and that the cash in the hands of the trustee derived from the sale of the Duhme Company assets was a part of the bankrupt estate. A petition to review and appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. The Circuit Court of Appeals sustained the lower court in an opinion printed in the 193 Fed. Rep., p. 616. This decision of the Circuit Court of Appeals is brought before this Honorable Court on appeal and an application for writ of *certiorari*.

The assignment of errors filed in connection with this appeal, recites that in the record, proceedings and decree of the United States Circuit Court of Appeals of the Sixth Circuit there is manifest error in this, to-wit:

> "1. In holding and deciding that the District Court of the United States for the Southern District of Ohio, had jurisdiction and power to enjoin the appellant from the prosecution of its cause of action against the Duhme Jewelry Company in the Court of Common Pleas of Hamilton County, Ohio.
>
> "2. In holding and deciding that the District Court of the United States for the Southern District of Ohio properly enjoined the appellant upon the facts presented to it on the hearing of the application for an injunction against the prosecution of appellant's cause of action in the Common Pleas Court of Hamilton County, Ohio.
>
> "3. In holding and deciding that the action of said District Court in granting said injunction was within its discretionary power.
>
> "4. In holding and deciding that the suit brought by appellant in the Court of Common Pleas of Hamilton County, Ohio, against the Duhme Jewelry Company, was an interference with the administration of the bankrupt's estate and constituted a cloud upon the title and possession of the assets of the bankrupt and a hindrance to the speedy and proper distribution of the estate of said bankrupt."

In the event that objection should be found to the appeal in this case, a motion and petition for writ of *certiorari* were filed for the reason that this case presents a novel question of great importance. The injunction granted and sustained below establishes a precedent which greatly enlarges the powers of injunction under

the bankruptcy act. For this reason, as stated in the petition for writ of *certiorari* the judgment of the Circuit Court of Appeals should be brought here for review:

> "1. Because no jurisdiction is conferred upon courts of bankruptcy under the act of July 1, 1898, nor does such jurisdiction exist as matter of inherent right in said courts, to enjoin or interfere with the prosecution of the suit *in personam* in the state court by your petitioner against the Duhme Jewelry Company, the lessee, which had not been adjudicated a bankrupt and was still liable to your petitioner upon the terms of its lease.
>
> "2. The effect of the decrees of the Circuit Court of Appeals and of the District Court, if they are permitted to stand, would be to deprive the courts of the several states of jurisdiction and power to entertain causes of action upon claims which were not provable in bankruptcy where the only object of said suits was to obtain a judgment *in personam* and where such suits could have no possible effect upon the administration of the bankruptcy law by the Federal court or upon the administration of the assets in its possession and control."

ARGUMENT.

The question which lies at the root of this dispute is whether a suit in a state court can be stayed by injunction of a court of bankruptcy, where such suit has no possible effect upon the administration of the bankrupt estate.

The jurisdiction to grant an injunction in this case depends entirely upon the authority granted by the Bankruptcy Act. If the authority is not granted the injunction can not be sustained.

The only authority conferred by the Bankruptcy Act to enjoin suits in a state court is by Sections 11*a* and 2 (15).

By Section 11*a* suits in state courts may be stayed which involve claims against the bankrupt which would be discharged by his discharge in bankruptcy. The purpose of staying such suits until after his discharge, is to permit the bankrupt to plead his discharge in bar of such suits. It is evident that this provision does not apply to the claim of the Mitchell Company against the Duhme Company because the Duhme Company is not a bankrupt, and the Mitchell claim is not provable in bankruptcy.

Section 2 (15) permits the bankrupt court to "make such orders * * * as may be necessary for the enforcement of the provisions of this act." Under this section injunctions have been issued to restrain suits in state courts where such suits prevented the enforcement of the provisions of the Bankruptcy Act by some actual interference. In such cases to use the language of Section 2 (15) the injunction was "*necessary* for the enforcement of the provisions of this act."

But there is no authority granted by the Bankruptcy Act to restrain suits in state courts where such action is NOT NECESSARY.

In the case of *McAlpine* v. *Tourtelotte*, 24 Fed., at page 71, the court discussing this point uses the following language:

> "The simple meaning of that was and is that since in a bankruptcy proceeding there may be various suits, by attachment, by execution and by a hundred ways, in the state courts which *hold, absorb* and *destroy* the assets before they can be administered in the bankruptcy court, in that class of actions the bankruptcy law al-

lows an injunction against everybody no difference where their proceeding is; but the old rule remains that *except in that class of actions*, the federal courts will not interfere by injunction in the suits pending in the state courts." [Italics ours.]

This injunction should not have been granted, and should be dissolved for two reasons:

A.

THE SUIT OF THE MITCHELL COMPANY IN THE STATE COURT IS NO INTERFERENCE WITH THE ADMINISTRATION OF THE BANKRUPT ESTATE.

B.

THE CASH IN THE HANDS OF THE TRUSTEE OF THE KECK COMPANY, DERIVED FROM THE SALE OF THE ASSETS OF THE DUHME COMPANY, IS NOT A PART OF THE BANKRUPT ESTATE.

A.

THE SUIT OF THE MITCHELL COMPANY IN THE STATE COURT IS NO INTERFERENCE WITH THE ADMINISTRATION OF THE BANKRUPT ESTATE.

(1). It will be noticed that the suit of the Mitchell Company against the Duhme Jewelry Company in the state court makes no mention of any fund in the hands of the trustee of the Keck Manufacturing Company, nor does it make the trustee a party. If judgment is recovered, the Mitchell Company will have three sources open for the satisfaction of that judgment, namely: (*1*). Any funds of the Duhme Jewelry Company in the hands of the trustee of the Keck Manufacturing Company. (*2*). If those funds have been distributed then the

judgment will be good against the Duhme Company, and any assets that may hereafter belong to it. (*3*). If no satisfaction can be obtained from either of the two foregoing sources then the Mitchell Co. may recover against the guarantors of the lease upon which the action in the state court is based.

If the Mitchell Company recovers a judgment against the Duhme Jewelry Company, it is obvious that in order to collect that judgment out of funds in the hands of the trustee of the Keck Manufacturing Company, the Mitchell Company will be obliged to present the judgment to the trustee for payment, at which time the trustee, if he awaits the determination of the suit in the state court before making distribution, may inquire into that judgment, and if it appears that the state court was not the proper place to liquidate the claim, will have the claim reliquidated and inquired into. In such a case, the trustee will have adequate remedy in the bankruptcy proceedings.

If, however, the trustee, having, as appears from the record, page 7, obtained an order from the referee making the Mitchell Company a party to the bankruptcy proceedings, desires to ignore the suit in the state court, it is hard to imagine any reason why he should not do so, and, with proper notice to all parties in the bankruptcy proceedings, proceed to make distribution of the funds in his hands.

(2). In *High on Injunctions*, 4th Ed., Vol. 1, page 42, it is stated:

> "It is always a sufficient objection to the granting of an injunction that the party aggrieved has a full and adequate remedy at law, and it is well established law that courts of equity will not lend their aid for the protection of rights or the prevention of wrongs, where

> the ordinary legal tribunals are capable of affording sufficient redress." And authorities cited there.

If, as has been stated, the trustee would have adequate remedy in bankruptcy proceedings should the Mitchell Company obtain a judgment and present the same to him for payment, the application of the above principle of law denies him the right to an injunction.

In *High on Injunctions*, 4th Ed., Vol. 1, page 14, it is stated:

> "A substantial and positive injury must always be made to appear to the satisfaction of a court of equity before it will grant an injunction, and acts, which although irregular and unauthorized, can have no injurious results, constitute no ground for relief." And authorities cited there.

If, as stated, the suit in the state court does not prevent the trustee from making a distribution, he having obtained an order making the Mitchell Store Building Company a party to the bankruptcy proceedings and being at liberty to distribute, the application of the principle above stated denies him the right of an injunction.

The trustee of the Keck Manufacturing Company does not state any positive and substantial injury. He claims that the suit of the Mitchell Company in the state court prevents him from making distribution of the money in his hands, and that therefore it is an interference with the administration of the bankrupt estate. *But his saying so does not make it so.*

(3.) Whilst the injunction issued in this case has granted the trustee relief to which he is not entitled, and which he does not need, it, at the same time, is depriving the Mitchell Store Building Company of a right which

can not, upon any theory, be denied to it, namely, the right to a judgment against the Duhme Jewelry Company, to be used by the Mitchell Store Building Company in any way that it can. If, this injunction is sustained, and, for some reason, distribution of the estate of the Keck Manufacturing Company should be further delayed, there being other claims still in litigation in the settlement of the Keck Estate, the Mitchell Store Building Company will in the meantime be deprived of its right of judgment against the Duhme Jewelry Company and may very readily suffer a substantial injury. The fact that it is not likely that the Duhme Jewelry Company will continue in business, does not affect the principle of law involved, for it is well recognized that suits may be brought against a bankrupt for the purpose of reducing to judgment claims against him not provable in bankruptcy, so that the judgment may be used as a basis of recovery against assets which the bankrupt may subsequently possess. Loveland, 2d Ed., top page 78. If the courts recognize this right in the case of a bankrupt, how much more potent are the reasons in the case of the Duhme Jewelry Company, which is not a bankrupt.

(4). The opinion of the District Court below (Record, pages 52 to 56), proceeds upon two theories: (*a*). That the tangible assets of the Duhme Jewelry Company belong to the Keck Manufacturing Company because the Keck Manufacturing Company owns all of the capital stock of the Duhme Jewelry Company. This theory will be discussed later in Section B. (*b*). The other theory advanced by the District judge proceeds from a well recognized line of cases cited in the opinion, in which courts of bankruptcy have enjoined suits in the state courts which interfered with the administration of the bankrupt estate. Each case cited by the court below where an injunction was granted, involved some positive interference with

the bankrupt estate, as for example: an attempt to replevy goods in the trustee's hands; an assertion of title to unsold property in the hands of the trustee which cast a cloud upon that property and prevented its sale; a suit in a state court brought against a trustee in bankruptcy seeking to enjoin him from selling certain fixtures in his possession; a suit in a state court whose pendency rendered impossible a composition of creditors affecting the entire solution and administration of a bankrupt estate; and similar cases where a positive interference was accomplished by a suit in a state court. The existence of the right of injunction in such cases is too well established to be disputed. They all proceed under Section 2 (15) of the act and upon the principle that the bankruptcy court will not permit the state courts to interfere with the administration of the bankrupt estate.

We contend that the present case does not fall within the authority of these cases because it does not fall within the principle involved. Our suit in the state court is not an interference with the administration of the bankrupt estate. The statement in the opinion of the District Court below, bottom, Record, page 55, to the effect that the mere fact that distribution has been delayed by the trustee proves that our suit in the state court is an interference, finds no support either in reason or in fact, for the following reasons: There are other claims still in litigation which prevent a distribution of the bankrupt estate. The fact that the trustee thinks that the suit in the state court prevents him from distributing, does not actually prevent him from doing so when the record shows that he has obtained an order of court making the Mitchell Store Building Company a party to the bankruptcy proceedings and commanding it to set up its claim; when the record shows that all of the assets in his hands consist of cash, and when it can not be disputed

that he can, at any time, by giving notice and by authority of court distribute the funds in his hands.

Injunctions have been issued to restrain suits in state courts which cast a cloud upon title to property which the trustee desired to sell, as part of the bankrupt estate. The reason injunctions are granted in such cases, is because the suit, in the state court, by casting a cloud upon the title to the property, actually deters purchasers from purchasing the property. These cases are entirely different from the present case, in which the trustee has nothing to dispose of but cash, and in which the cloud is not upon the cash, but is upon the mind of the trustee. In its last analysis, this injunction has the effect of removing the cloud from the mind of the trustee. There is no authority in the Bankruptcy act for such an operation.

(5). The opinion of the Circuit Court of Appeals below, reported in 193 Fed. Rep., 616, is based entirely upon the theory that a judgment secured by the Mitchell Store Building Company against the Duhme Jewelry Company in the state court would be an interference with the administration of the bankrupt estate of The Keck Manufacturing Company in that it might embarrass the distribution of the cash derived from the sale of the assets of the Duhme Jewelry Company. The Circuit Court of Appeals lost sight of the fact that the Mitchell Store Building Company was entitled to prosecute its claim in the state court quite independently of any bankruptcy proceedings, and without reference to any funds in the hands of the trustee. The question whether a judgment secured in the state court and presented for payment to the trustee in bankruptcy would be conclusive as to validity and amount, is a clear question easily determined under existing laws. The law relating to the administration of estates in bankruptcy provides clear and ample

means to a trustee in bankruptcy to guide him in disposing of such a judgment, when presented. Ignorance of such law does not entitle him to relief by injunction.

The opinion of the Circuit Court of Appeals assumes that the cash derived from the sale of the assets of the Duhme Jewelry Company is a part of the bankrupt estate. Such an assumption is contrary to the law cited later in B of this brief. The fact that the the bankruptcy court has possession of this fund in no way proves that the fund is a part of the bankrupt estate. The surplus of the Duhme fund, if any, may belong to the bankrupt estate after payment of the Duhme Company debts, but that part of the fund subject to the payment of Duhme Company debts is, under the authorities later cited, not a part of the bankrupt Keck company estate.

The Circuit Court of Appeals further assumes that the Mitchell Store Building Company was about to take a default judgment against the Duhme Jewelry Company. The record in this case does not show this to be a fact, and such is not a fact. The suit of the Mitchell Store Building Company against the Duhme Jewelry Company was on the default docket of the state court in which it had been filed, but the attorneys for the trustee of the Keck Manufacturing Company and the trustee himself, who had recently also acted as receiver of the Duhme Jewelry Company, had full knowledge of the pendency of this case on the default docket. They had every opportunity to remove the case from the default docket before or after judgment and to defend it in the name of the Duhme Jewelry Company. This is precisely what the attorneys for the trustee and the trustee himself will arrange to have done in the event that this honorable court dissolves the injunction which we complain of.

Relying upon the two assumptions above pointed out, the Circuit Court of Appeals, at the bottom of page 619, 193 Fed. Rep., uses the following language:

> "What would have been the effect had the writ not been issued and the default judgment had been permitted to the appellant? Unquestionably, under these circumstances the appellant might present a liquidated claim for the amount of its judgment and costs to the referee, who, in such event, *would be compelled to meet the question of its allowance or rejection.* It seems to us that the statement of this fact determines this appeal." [Italics ours.]

At the bottom of page 620 the Circuit Court of Appeals below goes on to say:

> "The inquiry, then, is whether a default judgment or a contest in the state court might have disturbed 'the possession of the property while it is in the custody of the court which has seized it'; that is, the bankruptcy court. Independent of the suggestion which we have made above on this subject, appellant answered the question for itself when it entered the bankruptcy court for the purpose of having impounded the fund."

The record before this honorable court shows an order of the referee making the Mitchell Store Building Company a party to the bankruptcy proceedings. Aside from the fact whether or not the Mitchell Store Building Company is or is not actually a party to the bankruptcy proceedings, it appears from that part of the record introduced by counsel for respondents that it is. If so, the bankruptcy court has secured jurisdiction over both parties in the matter of the petition of the trustee (found on pages 5 and 6 of the record) by virtue of the order of

the referee making the Mitchell Store Company a party in that proceeding, which order appears on page 7 of the record. This order commands the Mitchell Store Building Company to set up in the bankruptcy proceedings whatever claim it may have against the Duhme Jewelry Company or its assets now in the hands of the trustee. The record shows service of this writ on page 8.

Upon the record of the proceedings last mentioned, in what manner, we respectfully submit, can the suit pending in the state court between the Mitchell Store Building Company and the Duhme Jewelry Company have any effect upon any fund in the hands of the trustee?

A judgment secured in the state court against the Duhme Jewelry Company under such circumstances would not be recognized by the trustee. The fact that we may not be able to secure payment of our judgment by the trustee does not deprive us of the right to obtain that judgment in the state court, and when so obtained to collect it from the Duhme Jewelry Company out of whatever funds it may subsequently come into possession of. To deny us this right by injunction may prove an injury to us for which we shall have no redress.

It will be noted that the lease between the Mitchell Store Building Company and the Duhme Jewelry Company (middle of page 45 of record) is guaranteed by Herman Keck and Oscar Keck. The security of this guarantee may be wholly lost or seriously impaired by reason of the delay which this injunction has caused and is causing in the progress of our suit in the state court.

It appears from the record that the trustee has employed Section 2 (6) of the Bankruptcy Act, wherein authority is given to the court

> "to bring in and substitute additional persons or parties in proceedings in bankruptcy when

necessary for the complete determination of a matter in controversy."

Having done this, he can not object to our proceeding with our suit in the state court, which, if his own proceedings in the bankruptcy court have been proper, can give us no rights which we can assert in the proceedings in the bankruptcy court.

The final conclusion in the opinion of the Circuit Court of Appeals below, found at bottom of 193 Fed. Rep., page 621, to the effect that:

> "So long, therefore, as appellant stood in a position to demand satisfaction of its claim against the Duhme Company out of the moneys in the hands of the trustee, the threatened default judgment would be an interference with the proper administration of the bankruptcy estate,"

emphasizes the error of the assumptions upon which that opinion was based and of the opinion itself.

B.

The Cash in the Hands of the Trustee of the Keck Company, Derived from the Sale of the Assets of the Duhme Company, is not a Part of the Bankrupt Estate.

The statement of the district court below in its opinion (Record, top page 53), to the effect that the Duhme Jewelry Company was in fact a part of the Keck Manufacturing Company under another name, citing the cases of

Re Munsey Pulp Company, 139 Fed. Rep., 546;
Re Reiger, Capner & Altmark, 157 Fed. Rep., 609; and
Re Watertown Paper Company, 169 Fed., 252.

is not sound law. The cases cited are easily distinguished from the present case.

In *Re Munsey Pulp Company*, 139 Fed. Rep., 546, the court did hold that the assets of the Great Western Company were the assets of the Munsey Company, for the reason that the Munsey Company owned all of the capital stock of the Great Western Company. Let us consider the language of the court on page 548:

> "The Great Western Company was undoubtedly a mere creature of the Pulp Company, having no independent business existence and organized solely for the purpose of facilitating the business of the latter. The Great Western Company has no shadow of claim to the property in controversy, and to permit it or its president or shareholders to dispose of such property, is to sanction a fraud upon the creditors of the Pulp Company."

And particularly the statement of the court at the top of page 547:

> "The record fails to show that there are any creditors of the Great Western Company."

There being no creditors of the Great Western Company, and the attempt of the stockholders of the Great Western Company being, as the court stated, a fraud upon the creditors of the Munsey Pulp Company, it is not surprising that the assets of the Great Western Company were turned over to the trustee of the Munsey Pulp Company. The case however did not decide that had there been creditors of the Great Western Company who dealt in good faith with the Great Western Company, and who objected to a transfer of those assets, that the assets of that company could have been summarily disposed of as was done.

The case of *Re Reiger, Capner & Altmark*, 157 Fed. Rep., 609, which followed *Re Munsey Pulp Co.*, and which was decided by the same judge who granted the injunction against the Mitchell Company in the District court below, went very much farther than the decision in *Re Munsey Pulp Co.*

In the Reiger case the court in deciding that a partnership, because of its ownership of all of the capital stock in a corporation, owned the assets of that corporation, disregarded the rights of the creditors of that corporation. It does not appear that the creditors of the corporation objected in that case. It was a contest between creditors of the partnership, and the partners individually, who sought to defraud their creditors.

Had any creditors of the corporation in that case objected, we believe that the court's attention would at least have been directed to a phase of the case which is evidently overlooked, and that is, that the creditors of a corporation may insist, for the protection of their rights, upon the recognition of the corporate entity of the corporation.

In *Re Watertown Paper Company*, 169 Fed. Rep., 252, the case of *Re Munsey Pulp Co.* is cited but not followed. The court says at bottom of page 256:

> "There is, as the appellees point out, a line of cases holding that when one corporation creates another corporation for a particular purpose and holds all its stock, the latter will be treated as the agent of the former or as an instrumentality for carrying out its purposes. In these cases the controlling corporation has been held liable for the debts of the subordinate company."

The court then proceeds to distinguish in *Re Munsey Pulp Company.* The case can not therefore be held to approve it.

The decree of June 2d, 1910, of the District Court below (Record, page 30), which turned over to the Keck Company the assets of the Duhme Company, shows that the contest there decided was between certain pretending stockholders of the Duhme Company who claimed to own stock in that company, and the trustee of the Keck Company. No creditor of the Duhme Company was a party to or objected to the proceeding. The contest like that in the Munsey and Reiger cases was whether those pretending stockholders could prevent a transfer of the assets. In such a contest the Munsey and Reiger cases were good precedents as far as they went, because in this contest as in the Munsey and Reiger cases, no creditor objected, *and the Mitchell Store Building Company claim was not yet in existence.*

The decree of June 2d was therefore sustained by the authority cited so far as the contest between pretending stockholders and the trustee was concerned but it is not sustained by any authority in so far as it affects the rights of *bona fide* objecting creditors of the Duhme Company.

It appears therefore that the authority for holding that the tangible assets of the Duhme Jewelry Company belong and are a part of the estate of the bankrupt Keck Manufacturing Company, comes from the cases of in *Re Munsey Pulp Company* and *Re Reiger, Capner & Altmark,* in which, for the purpose of preventing a fraud the court held that ownership of stock carried with it the ownership of assets, so as to permit the trustee of the bankrupt owner of said stock to seize the tangible assets

of the corporation. But the creditors of the corporations did not object in either of these two cases.

In this case the Mitchell Store Building Company, a creditor who dealt in good faith with the Duhme Jewelry Company as a separate corporation, and whose claim against the Duhme Jewelry Company did not exist until after the assets of the Duhme Jewelry Company had, by order of court, been turned over to the Keck Manufacturing Company, asserts that the transfer of the assets of the Duhme Jewelry Company to the Keck Manufacturing Company was, notwithstanding the order of the District Court, contrary to the following principles of law:

In *Thompson on Corporations,* 2d Ed., Vol. 5, bottom paragraph 6618, it is stated:

> "The courts generally agree that after a dissolution, the corporate assets are a trust fund for the payment of the debts of the corporation, and that a court of equity will so apply them before any distribution can be made to the stockholders."

In *Sanger* v. *Upton,* 91 U. S., 60, it is stated:

> "The amount of the unpaid subscriptions to the stock of the corporation is a trust fund for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration, and without notice. It is publicly pledged

> to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

In *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, Chief Justice Fuller lays down very clearly the law as to what title a trustee of the estate of a bankrupt takes:

> "The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues."

The bankrupt act, Section 70*a*, provides:

> "The trustee of the estate of a bankrupt upon his appointment and qualification * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all * * * (5) property which prior to filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

We submit that the assets of the Duhme Jewelry Company could not have been transferred by the Keck Manufacturing Company prior to the adjudication, nor could they have been levied upon or sold under judicial process

against the Keck Manufacturing Company. These assets were therefore not a part of the assets of the Keck Manufacturing Company and are not now a part of the bankrupt estate.

CONCLUSION.

In conclusion, we respectfully submit that this injunction should be dissolved. The granting of the injunction by the courts below was wholly unsupported by any authority derived from the bankruptcy act. This injunction, if sustained, establishes a precedent far reaching in its effects.

It is a wide departure from established precedent.

The Bankruptcy Act affords ample protection to the trustee by its provisions, one of which he has employed by securing an order commanding the Mitchell Store Building Company to come into the bankruptcy proceedings and therein set up its claim, if any, against the Duhme Jewelry Company. Under these proceedings the Bankruptcy Court has undoubted power to pass upon the Mitchell Co. claim if it is presented. If it is not presented it has the power to make distribution of the fund and thereby exclude it from participation therein. The suit in the state court under these circumstances can not in any possible way interfere with the distribution of the bankrupt estate, all of which is cash in possession of the Trustee.

Respectfully submitted,

P. Lincoln Mitchell,

DeCamp & Sutphin,

Attorneys for Petitioner and Appellant.

Walter C. DeCamp

Of Counsel

Supreme Court of the United States

October Term, 1911.

No.

THE MITCHELL STORE BUILDING COMPANY, *Petitioner*,

vs.

R. DEV. CARROLL, Trustee in Bankruptcy of THE HERMAN KECK MANUFACTURING COMPANY, Bankrupt, *Respondent.*

Brief for Respondent in Opposition to the Petition for a Writ of Certiorari.

Petitioner seeks to have this court review by certiorari a decree of the United States Circuit Court of Appeals for the Sixth Circuit which affirmed an order of the District Court granting a temporary injunction against petitioner, a party to a bankruptcy proceeding in the District Court. The order restrained petitioner, pending the settlement of the bankrupt's estate, from prosecuting a suit in a state court brought for the purpose of obtaining a lien on a part of the bankrupt's estate, which was in the custody of the District Court by virtue of the bankruptcy proceeding. See opinion of the Circuit Court of Appeals reported in 193 Fed. 616. The petitioner now has an appeal pending in this court to review said decree of the Circuit Court of Appeals.

We respectfully submit that the petition should be denied.

LAWRENCE MAXWELL,

Counsel for Respondent.

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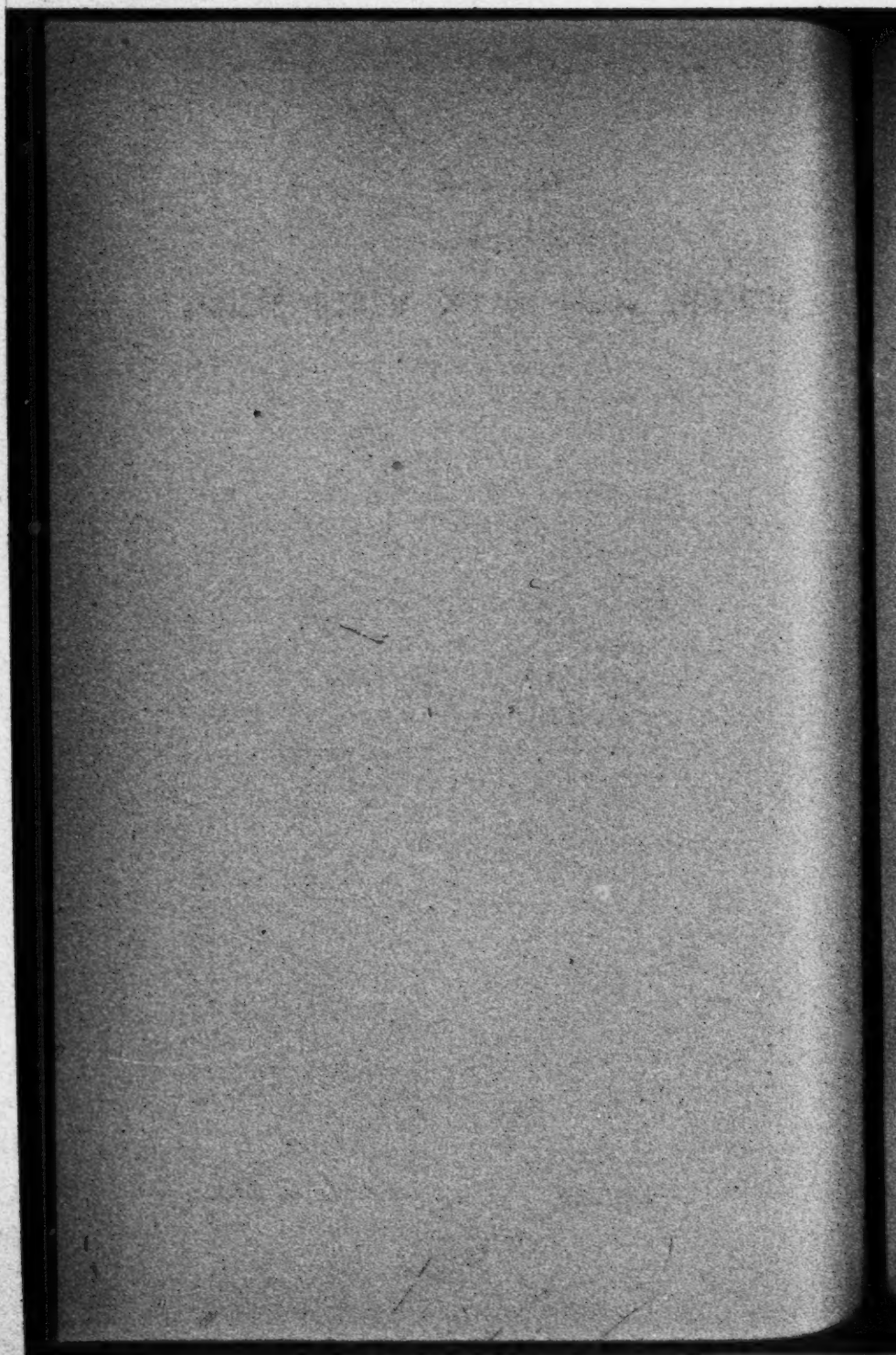


No. 212.

OCTOBER TERM, 1913.

Supreme Court of the United States,

THE MITCHELL STORE BUILDING COMPANY, *Appellant*,

vs.

R. deV. CARROLL, Trustee in Bankruptcy of the Herman Keck Manufacturing Company, Bankrupt, *Appellee*.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

On February 8, 1909, certain creditors of The Herman Keck Manufacturing Company, a corporation organized under the laws of Ohio and engaged in the manufacture of jewelry at Cincinnati, Ohio, filed a petition in bankruptcy against it in the United States District Court there, praying also for a receiver of its property and assets. At the same time, said petitioning creditors filed an application in said District Court for the appointment of a receiver for the property and assets of The Duhme Jewelry Company, which was also a corporation organized under the laws of Ohio and engaged in the retail jewelry business in said city, alleging that said Duhme Company was a mere department and adjunct of said Keck Company; that all its capital stock was owned and held by said Keck Company; that its Board of Directors consisted of the same persons and officers as were directors and officers of said Keck Company; that all of the funds for the organization

and transaction of its business were furnished by said Keck Company, and that said companies were in fact one and the same concern; that both companies occupied the same premises in Cincinnati; that their books of account and finances were in charge of the same bookkeeper and office management, and that there were creditors of the Duhme Company "who may have a first equity in the assets of said Company for the payment of their respective claims, but that the value of the assets of said Company is largely in excess of the claims of the creditors of said Duhme Company, and that the surplus after said claims are paid belongs to and is the property of The Herman Keck Manufacturing Company." Said application also alleged "that for each and all of the foregoing reasons it is absolutely necessary and essential for the protection of the creditors of The Herman Keck Manufacturing Company and the preservation of the estate of The Herman Keck Manufacturing Company in bankruptcy, that a receiver be appointed to take charge of the assets and the property of The Duhme Jewelry Company." (Rec., pp. 10-13 and 33). On the same day, to-wit, February 8, 1909, Robert deV. Carroll was appointed receiver of both companies. The Keck Company admitted that the property and assets of The Duhme Company belonged to it, and alleged that it was solvent, etc. (Rec., 22-24). It was subsequently, to-wit: on December 3, 1909, after a protracted hearing before the Referee and District Judge Thompson, adjudged a bankrupt, and Carroll was elected and qualified as its Trustee. (Rec., 24).

On March 28, 1910, Carroll, as said Trustee in Bankruptcy, filed a petition in the District Court, alleging in substance that the Duhme Jewelry Company was a mere department and adjunct of the Keck Company, that they were in fact one

and the same concern; that the Keck Company was the owner of all the assets of the Duhme Company, etc., and praying "that Robert deV. Carroll, Receiver of The Duhme Jewelry Company, may be authorized and directed to turn over to him all of the assets in his possession as such receiver, and as certain creditors have appeared herein claiming to have dealt with The Duhme Jewelry Company as a separate corporation and asserted that their claims against said corporation are entitled to be first paid out of the assets of The Duhme Jewelry Company before creditors of The Herman Keck Manufacturing Company are entitled to any part of said assets, that said Trustee be further ordered to preserve said assets of said The Duhme Jewelry Company by proper accounting and record as a separate property until the further order of this court." (Rec. p. 34). This petition was strenuously resisted by persons claiming to be stockholders of the Duhme Company, and on June 2, 1910, the District Court (Judge Sater), after a full hearing, found "the issues joined in favor of said Robert deV. Carroll, Trustee in Bankruptcy of The Herman Keck Manufacturing Company, and that all of the property and assets of The Duhme Jewelry Company, now or heretofore in his hands as Receiver was the property of the bankrupt herein, The Herman Keck Manufacturing Company, and is now the property of and belongs to said Robert deV. Carroll as Trustee in Bankruptcy of its property and assets," and ordered and adjudged "that said Robert deV. Carroll, as said Receiver of the property and estate of The Duhme Jewelry Company, forthwith turn over to himself as Trustee in Bankruptcy of the bankrupt herein, all of the property and assets, including cash, now in his hands as such Receiver, and that he keep an account thereof separate and

distinct from his account of the balance of the property of said bankrupt." Judge Sater's opinion is found at Rec. 26-30 and the decree at Rec. 30-31. No appeal was taken from this decree, and all of the property and money in the hands of the Receiver of the Duhme Company was accordingly turned over to the Trustee in bankruptcy of the Keck Company and the Receiver discharged.

All of the claims against the Duhme Company which have been proved and allowed in the bankruptcy court have been paid by said Trustee in Bankruptcy, and there is a balance of cash in his hands derived from the sale of the property and assets of *that* Company sufficient to pay the claim of the appellant, if on final hearing it shall be adjudged to be a valid claim against that company (Rec. 34).

Appellant's claim is for $6,500.00 damages alleged to have been sustained by it because of the breach of certain covenants of a lease between it and the Duhme Company, dated August 30, 1900, for the occupancy of certain premises in Cincinnati known as Nos. 19 to 25 West Fourth Street, and part of which it sublet to the Keck Company. The Duhme Company occupied said premises and paid the rent fixed by the lease until February 8, 1909, when, as heretofore stated, Carroll was appointed Receiver of its property and assets. He occupied said premises and paid said rent from that time until June 30, 1910, on which day the Trustee in Bankruptcy vacated them and elected not to take said lease, under the order of the bankruptcy court entered on June 9, 1910 (Rec. 35). The damages claimed by appellant represent the difference between the rent for said premises as fixed by said lease for the period from June 30, 1910, until December 31, 1910, the end of the term granted by said lease, and the rent

it was able to obtain for them for said period from the McAlpin Company, to whom it subsequently leased them, and the amount of certain waste alleged to have been committed by said Duhme Company (Rec. 35 and 40).

The following steps have been taken by appellant to enforce its said claim, viz:

1. On October 8, 1910, it brought an action in the Common Pleas Court of Hamilton County, Ohio, against the Duhme Company for said sum of $6,500.00, and caused summons to be issued and served on said company. A copy of the petition is found at Rec. 39.

2. On the same day it filed an application in the District Court for an order directing the Trustee in bankruptcy to withhold from distribution $6,500.00 of the Duhme Company's assets, "until final judgment is rendered in said suit" (Rec. 38). This application was granted on October 24, 1910 (Rec. 47-48), and on November 3, 1910, said Trustee in bankruptcy moved to have said order set aside (Rec. 48).

3. On November 14, 1910, the appellant moved to strike said motion of the Trustee from the files (Rec. 49). On November 19, 1910, said motion of the Trustee was sustained, said motion of the appellant overruled and its application to withhold from distribution said sum of $6,500.00 also overruled (Rec. 36-37). It subsequently filed in the District Court its petition to review said order of November 19th (Rec. 49-52). This petition to review is still under submission to the District Court.

On November 23, 1910, said Trustee filed a petition with the Referee in Bankruptcy, alleging that appellant's said claim and suit "constitute a cloud upon the title and possession of your petitioner to said assets of said Duhme Jewelry

Company now in his hands as Trustee of the Bankrupt herein, and a hindrance to their speedy and proper distribution by him to creditors of said bankrupt, and that it is necessary for the complete determination of said claim and for a speedy and proper distribution of said assets to creditors of said bankkrupt, that said The Mitchell Store Building Company be forthwith made a party to this proceeding.

Wherefore your petitioner prays that said The Mitchell Store Building Company be forthwith made a party to this proceeding and ordered to set up herein whatever claim or claims, if any, it may have against said Duhme Jewelry Company or its said assets now in his hands as aforesaid; that notice of the pendency and prayer of this petition, in such form as the court may deem proper, be given to or served upon said Mitchell Store Building Company, and for such other or further relief as he may be entitled to in the premises," and on the same day an order was entered by the Referee as prayed (Rec. 5-7). A subpœna was also issued on this petition for the appellant and served on it (Rec. 7-8).

On December 9, 1910, said Trustee filed a motion in the District Court (Rec. 9-10) for an order restraining the appellant from proceeding with or continuing the prosecution of said suit by it in the Common Pleas Court, and also his affidavit in support thereof, in which he alleged that it "has applied to the Court of Common Pleas of Hamilton County, Ohio, for a judgment by default or otherwise against The Duhme Jewelry Company in the suit which is now pending in said court against said Duhme Jewelry Company, the nature of said suit being fully set forth in his petition filed herein on November 23, 1910, and that said company threatens to and will unless enjoined by this Honorable Court,

proceed with the prosecution of said suit and obtain such a judgment therein against said Duhme Jewelry Company.

"Affiant believes that the purpose of said Mitchell Store Building Co. in obtaining such a judgment is to file same with the Referee in Bankrkuptcy herein as a preferred claim or lien upon the assets of said Duhme Jewelry Company now in his hands as Trustee in Bankruptcy of The Herman Keck Manufacturing Company." After a full hearing by the District Court (Judge Sater), appellant not denying the allegations of said affidavit, the injunction prayed for was allowed. His opinion on the application for said order is found at Rec. 52, and the order of injunction, which was entered on February 15, 1911, at Rec. 56-57.

On February 24, 1911, the appellant filed in the United States Circuit Court of Appeals for the Sixth Circuit a petition for review and an appeal (Rec. 1) from said order of injunction. After a full hearing that court affirmed the order appealed from (Rec. 65-70), and 193 Fed. 616. It is to review the correctness of that affirmance that appellant has taken this appeal (Rec. 70).

ARGUMENT.

I.

No proceeding was taken by any of the parties to the decree of the District Court, entered on June 2, 1910, adjudging the assets of The Duhme Company to belong to the trustee in bankruptcy of the Keck Company, or by the Appellant, to review said decree, and it is therefore final and conclusive of that question.

Appellant's counsel argue (Brief, p. 3) that it was not a party to the bankruptcy proceedings of the Keck Company, or to the proceedings by which the Duhme Company's assets

were turned over to the Trustee in Bankruptcy of the Keck Company, and could not have been for the reason that it had no claim against the Duhme Company at that time, the covenants of the lease not being broken until June 30, 1910. This being true, it necessarily follows that said decree was correct and proper when entered, so far as appellant was concerned. If, because of subsequent changes in conditions, it became injurious as to it, the plain duty of the appellant was to have itself made a party to the proceedings in the District Court and there set up the facts. The right to appeal from the decree of June 2nd was not lost to parties until December 2nd, 1910 (26 Stat. at Large, 827, Sec. 11), long after appellant knew the exact amount of its alleged claim against the Duhme Company. Not having intervened in the District Court, but having permitted that court's decree to become operative and the assets of the Duhme Company to be turned over to the Trustee in Bankruptcy of the Keck Company and by him administered as assets of that company (see the certificate of the Referee at Rec. 32), it is now too late for it to question the correctness of that decree, and the Circuit Court of Appeals has so decided (Rec. 66-67). Appellant's counsel attempt to question this decision and dispute indirectly the decree of June 2, 1910, by arguing (Brief, 14) that the Circuit Court of Appeals necessarily assumes the legal correctness of that decree. But that court only assumes the true state of facts, namely: that the assets of the Duhme Jewelry Company were in the possession of the Trustee, and that the validity of that possession is now questioned by no one. A fund in the possession of a trustee in bankruptcy as trustee must be considered a part of the bankrupt estate until it is separated therefrom by legal proceedings. In Hebert vs.

Crawford, Trustee, 228 U. S. 204, it was held that such proceedings under certain circumstances could be instituted in the state courts. But such is not the nature of the suit now enjoined, and the appellant not only has failed to begin such proceedings in a state or federal court, but has "recognized the matter as closed when it voluntarily came into the District Court to ask that it might have sufficient of the assets so acquired by the court of bankruptcy impounded to meet its anticipated judgment." (Opinion of Circuit Court of Appeals, Rec. 67; see to the same effect In re Trayna, 195 Fed. 486.)

II.

Appellant's objections to the decree of June 2nd are without merit.

If we bear with the counsel for the appellant and concede for the sake of argument, that it is entitled on this appeal to question the correctness of the decree of June 2nd, 1910, what is the result? It is not necessary to maintain that the ownership of capital stock in a corporation always carries with it the ownership of the tangible assets of that corporation. Whether such a proposition is correct or not, as a matter of law, is not material, because it did not constitute the sole basis for the opinion and decree of the learned District Judge. This is obvious from the opinion itself (found at Rec. 26) and from the following quotation from the later opinion of the District Court on the motion for injunction, viz:

> "At or about the time the petition in bankruptcy was filed against The Herman Keck Manufacturing Company, hereinafter called the Keck Company, and a Receiver was appointed therefor, an application was also made for the appointment of a Receiver for The

Duhme Jewelry Company, hereinafter called the Duhme Company, on the ground inter alia, that the funds furnished to the organization for the transaction of its business were furnished by the Keck Company, that it was a subsidiary company and a mere department, adjunct, selling agency and instrumentality of the Keck Company; that its stock was all owned by the latter company and that the two companies were in fact one, and their assets were greatly commingled. The person appointed Receiver of the Keck Company was also designated as the Receiver of the Duhme Company. Thereafter the Keck Company was adjudicated a bankrupt and a trustee in bankruptcy was elected.

"In May, 1910, after a full hearing in a controversy between stockholders and creditors, on the facts submitted and the law as found in Re Munsey Pulp Co., 139 Fed. Rep. 546, Re Reiger, Kapner & Altmark, 157 Fed. Rep. 609, and Re Watertown Pump Co., 169 Fed. Rep. 252, an opinion was handed down in this court, holding that the Duhme Company was a mere adjunct and asset of the Keck Company. It was affirmatively found that the reorganization and readjustment which took place as between the two companies in 1907 was had because the Duhme Company was a mere department of the Keck Company, and because if the Duhme Company should be shown as an asset of the Keck Company, which felt the need of a larger capital, the latter company would have a better credit margin for carrying on its business" (Rec. 52-53).

The court did not decide that because all of the capital stock of the Duhme Company stood in the name of the Keck Company it thereby owned all of the property and assets of that company, but regarded that fact, and properly so, as bearing upon the question of the real ownership of its assets, viz:

"The proceedings had on June 1, 1907, by the stockholders and directors of the two companies resulted merely in a transfer into the name of the Keck Company of that which it already owned." Opinion of May 26, 1910, Rec. 29.

Appellant's counsel at p. 20 of their brief, say that "the decree of June 2nd was therefore sustained by the authority cited so far as the contest between pretending stockholders and the trustee was concerned, but it is not sustained by any authority in so far as it affects the rights of bona fide objecting creditors of the Duhme Company," and on page 21 contend that said decree is contrary to the familiar principle that a court of equity, on the dissolution of a corporation, will apply the corporate assets to the payment of its debts, before any distribution is made to its stockholders. But counsel lose sight of the fact that the District Court in turning the assets of the Duhme Company over to the Trustee in bankruptcy of the Keck Company, expressly said that "If no complication exists or arises, he should at an early date, if practicable, apply the funds, and the proceeds of the property yet to be sold, *to the satisfaction of debts due those who dealt in good faith with that company.*" Rec. 30, and again in its opinion on the application for injunction "the proceeds arising from the sale of such assets were ordered to be held separate from those of the Keck Company and *applied first to the satisfaction of debts due those who dealt in good faith with the Duhme Company, the surplus, if any, to be applied to the payment of the debts of the Keck Company.*" Rec. 53. This direction of the court has been carefully carried out, and as the agreed statement of facts shows (Rec. 34), all creditors of the Duhme Company who had sufficient confidence in the bona fides of their claims to prove them with the Referee as

claims against that company, have long since been paid in full. The corporate entity of the Duhme Company has not been lost sight of for a moment by the bankkruptcy court in its administration of the estate, but on the contrary has been scrupulously preserved for the benefit of every person entitled to it.

The objections of appellant to the decree of June 2nd which we have been considering, are purely technical. It is to be noted that it does not deny that all of the funds for the organization of the Duhme Company were furnished by the Keek Company; that the one was merely the selling agency of the other; that the two were "only distinguished in name for the sake of retail and wholesale distinction," etc. (Rec. 26). These are facts, the existence and truth of which have been found by the District Court after a full hearing on evidence, and on which it based its decree. Appellant does not and can not controvert them; they are not before this court for review, and the decree, based as it is upon them, will be accepted as final and conclusive.

It is worthy of mention that prior to Judge Sater's decision of May 26, 1910, and after a hearing lasting many months, the same conclusion had been reached by the Referee and by District Judge Thompson in adjudicating the Keek Company a bankrupt (Rec. 24 and 32); that no creditor of the Duhme Company contested the transfer of these assets to the Trustee in bankruptcy; even the alleged stockholders of that company realizing the futility, on the evidence adduced in the District Court, of contesting the correctness of that transfer, accordingly prosecuted no appeal from that court.

III.

The claim of appellant is nominally against the Duhme Company, but, reduced to its last analysis, is against the bankrupt estate, and the District Court having at all times prior to the existence of its claim, and to the institution of its suit in the state court, had possession and control of the property composing the bankrupt's estate, has jurisdiction "to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein" (Mr. Justice Day in Whitney vs. Wenman, 195 U. S. 589, at page 552).

As said by the lower court, Rec. 54-55:

> "Nevertheless, the Duhme Company was the Keck Company under another name. Its assets were the property of the Keck Company, and after its bona fide debts were paid, the creditors of the Keck Company are entitled to the surplus proceeds for the satisfaction of their claims. The title to the property of the Duhme Company to the outside world was in that company, but was in fact in the Keck Company and, subject to the rights of the Duhme Company's bona fide creditors, was under the control of the Keck Company. The title to the Duhme Company's property passed to the trustee in bankruptcy as of the date of the adjudication. The money which the Mitchell Company seeks to recover is a part of the bankrupt's assets, in the possession of the bankruptcy court, subject to its control and its order of distribution. The Mitchell Company recognized this fact when it filed a motion in the referee's court for an order directing that so much of the funds in its hands be set aside as may be necessary to pay the judgment, if any, which it may obtain in the state court, and also when it moved to strike the Trustee's motion from the files and resisted the vacation of the referee's order. Its claim is nominally against the

Duhme Company, but, reduced to its last analysis, is against the bankrupt's estate. The trustee holds the property for whoever may be found rightly entitled to it, and persons claiming the right to share in it may be called upon to come into the bankruptcy court to assert their claims. The creditors are interested in determining the validity of every claim presented against the fund. The property, being in possession of the bankruptcy court, is withdrawn from the jurisdiction of all other courts, and that court has ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of such property."

To the same effect as Whitney vs. Wenman, supra, are:

White vs. Schloerb, 178 U. S. 542.

Bryan vs. Bernheimer, 181 U. S. 188.

Murphy vs. Hoffman Company, 211 U. S. 562, 570, where Mr. Justice Moody said, p. 570:

"The last two cases cited (referring to Whitney vs. Wenman and White vs. Schloerb, supra) proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers or trustees, has taken possession of a res, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession can not be disturbed by the process of another court. And see Skilton vs. Codington, 185 N. Y. 80, 85, 86 and Frank vs. Vollkommer, 205 U. S. 521, which by implication approve the same principle."

Hebert vs. Crawford, Trustee, 228 U. S. 204, 208, where Mr. Justice Lamar said: "Under these decisions (Whitney vs. Wenman; Murphy vs. Hoffman Co. supra) the physical possession of the crop brought the property within the exclusive jurisdiction of the bankrupt court. The finding in the

Summary Proceeding that LeBlanc had received possession, as trustee, was conclusive against him and was not subject to collateral attack by third persons."

In re Antigo Screen Door Co., 123 Fed. 249, 251, 253.

Keegan vs. King, 96 Fed. 758

In re McCallum, 113 Fed. 393

In re McMahon, 147 Fed. 684, where Judge Lurton said, p. 685:

"But we are now dealing with the jurisdiction of the District Court which had possession through its Trustee of the property of the bankrupt against which the protesting petitioner asserts a mortgage lien. If the District Court having possession of the res did not have jurisdiction to hear and determine claims to or against the res, unless the claimant should consent, what court did? Could the petitioner go into the state court and there assert his lien and then obtain a decree for its enforcement and thus deprive the court of primary jurisdiction of the control and custody of the controverted property? The possession of the res draws to the court jurisdiction of all questions in respect to title or liens irrespective of citizenship. Krippendorf vs. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Toledo & Rd. Co. vs. Continental Trust Co., 95 Fed. 487, 36 C. C. A. 155."

In re Swofford Bros. Dry Goods Co., 180 Fed. 549.

LeMaster vs. Spencer, 208 Fed. 210, 216.

We have shown in Subdivision I of this brief that it can not now be disputed that this fund is in the trustee's possession as a part of the bankrupt estate. The cases here cited support unreservedly the statement in Loveland on Bankruptcy, 4th. ed., pp. 107-108, that:

"Where property is in the possession of the trustee or receiver as a part of the bankrupt's estate, a court of bankruptcy has jurisdiction to settle all controversies and claims relating to such property" (p. 107, and cases cited).

IV.

Appellant was a party to the bankruptcy proceedings in the District Court and subject to the direct control of that court.

It doubtless became a party by its application of October 8th, 1910 (Rec. 38-39), in which it asked the District Court for affirmative relief with respect to property in that court's hands for distribution and which did not attempt to reserve jurisdiction (see In re Mertens, 131 Fed. 507, at p. 512, and opinion of the District Court, Rec. p. 56), but to remove any possible doubt on that point the Trustee's petition of November 23rd, 1910, set forth the allegations necessary to bring in new parties under subdivision 6 of Section 2 of the Bankrupt Act, giving that court jurisdiction to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy."

Said petition also alleged that the suit brought by appellant in the Common Pleas Court constituted a cloud upon his title to and possession of the Duhme Company assets and that said suit and the claim made by appellant therein was a hindrance to the speedy and proper distribution by him of said assets to creditors of the bankrupt, and therefore within subdivisions 7 and 15 of said Section 2, viz:

"Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in re-

lation thereto, except as herein otherwise provided" (Sub. 7);

"Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act" (Sub. 15).

The order of the Referee of November 23rd making appellant a party, etc., was therefore within his jurisdiction and is valid and binding upon the appellant. Moreover, its validity has not yet been attacked or questioned by or through any pleading filed by appellant.

On this point the Circuit Court of Appeals said: (Rec. 69).

"Appellant seems not to question that it is a party to the bankruptcy proceeding, which relation was effected, if not by its voluntary appearance with its motion to impound, certainly by its subsequent appearance to resist the application for a temporary injunction after a subpoena on it had by order of the referee been served on it upon application of the trustee to make it a party."

V.

Appellant's suit in the state court interferes with the speedy and proper distribution of the bankrupt estate and the injunction was therefore properly granted.

The Trustee's application asked the District Court to enjoin a party to the general bankruptcy proceeding pending before it, and whom it had properly ordered to set up for adjudication therein whatever claim it might have against the bankrupt's estate, from violating that order by proceeding further in its suit in the state court, and thus interfering with the due and proper administration of the bankrupt's estate.

The claim of the Mitchell Company is in substance that by virtue of its alleged dealings with the Duhme Company as a separate corporation, etc., it is entitled to be paid out of its assets (which are sufficient to pay in full all of such claims as may be valid), before the Keck creditors share therein. The affidavit of the Trustee filed in support of his application (Rec. 9) alleges that "affiant believes that the purpose of said Mitchell Store Building Company in obtaining such a judgment is to file the same with the Referee in Bankruptcy herein as a preferred claim or lien upon the assets of said Duhme Jewelry Company now in his hands as Trustee in Bankruptcy of The Herman Keck Manufacturing Company." That is to say, it would be claimed that such a judgment, while it could not of course be a lien itself, would be a judicial determination, or as appellant's counsel put it on p. 9 of their brief, "a liquidation," of the amount of its claim and as such entitled to preference in payment out of the Duhme assets, etc. These allegations of the Trustee are not now and never have been denied by the appellant or its counsel.

The purpose of the Trustee in seeking the injunction was to avoid the necessity of the court and himself having to meet at sometime in the future this very *claim* of liquidation, or any similar one, by preventing the appellant from laying the foundation for it. That this will be the result, if appellant is not restrained from prosecuting its said suit, is further shown by the following quotation from page 9 of its counsel's brief, viz: "the Mitchell Company will be obliged to present the judgment to the Trustee for payment, at which time the Trustee, if he awaits the determination of the suit in the state court before making distribution, *may*

attempt an inquiry into the judgment, and if it appears that the state court was not the proper place to *liquidate* the claim, will have the claim *reliquidated and inquired into.*" Can it be said that such a course, by one who is a *party* to the bankruptcy proceedings, and who has been ordered to set up therein any claim which it might have, is not an interference with the speedy and proper administration of the bankrupt's estate, or that no benefit results to that estate by now putting an end to such a course? Does not such action by the court promote the policy and purpose of the bankrupt act, which every court that has ever considered the question has held to be "to secure an *equal* and *speedy distribution* of the bankrupt's estate among his creditors?" Under such circumstances can it be said that such an injunction is not "necessary for the enforcement of the provisions of this Act" (Bankruptcy Act)? We submit the answer is plain.

It is argued by the appellant's counsel that since the Trustee can have any judgment that might be rendered by the state court inquired into, etc., that he therefore has an adequate remedy in the bankruptcy proceedings. If he can avoid the effect of such a judgment, after it is rendered, there is no good reason why he can not prevent its rendition in the first instance and thus more speedily distribute the bankrupt's property among its creditors, and this is what the injunction accomplishes. Counsel also argue that since the Trustee has this inquisitorial power, no injurious results can follow the prosecution of its suit in the state court. But they have followed and are now more present than ever, viz: the interference with the speedy distribution of the assets among the creditors of the Keck Company and the necessary expense entailed upon them of the defense of this appeal. As said by the learned District Judge (Rec. 55, 56):

"The claim that the suit in the state court will not operate to delay the settlement of the bankrkupt's estate finds its answer in the fact that it has delayed and is now delaying proceedings in that respect. A *discreet trustee* would hardly proceed to disburse a fund with knowledge of an intent on the part of another to assert a claim of considerable size against the fund in his possession. The purpose of the suit brought by the Mitchell Company in the state court is to lay the foundation of a claim against the Duhme Company's funds, which are a part of the bankrupt's funds. Its motion in the Referee's court that a part of such funds should be set apart to await the action of the state court shows this to be true. The Mitchell Company has entered the bankruptcy court as regards its claim, and even now is prosecuting a petition to review an order of the Referee relating to the retention of the funds to meet the claim, if any, which it may be able to establish. The bankrupt's creditors are entitled to be heard as to whether the Mitchell Company has a claim or not. Neither they nor their representative, the trustee in bankruptcy, are parties in the state suit."

What object other than the embarrassment of the trustee and the administration of the bankrupt estate in his hands can the appellant have in abandoning proof of claim against the fund which is admittedly more than sufficient to pay its claim, and which is the only property of the Duhme Company in existence or likely to be in existence?

The opinion of the Circuit Court of Appeals (Rec. 69) states that the appellant's action is "of such a character as to suggest to a discreet trustee and a careful court the inadvisability of distributing the assets of the estate until it were seen that the trustee as the representative of the Keck creditors was protected." The criticisms of that opinion found

on pp. 13 to 17 of appellant's brief are sufficiently answered in the opinion itself. It is enough to notice in answer to one contention that the learned court considers fully the question of a contested suit in the state court as well as a possible default judgment.

Counsel argue, brief, p. 12, that the foregoing statement of the District Court is not correct because "there are other claims in litigation which prevent a distribution of the bankrupt estate." While it is true that there are two other claims which prevent the immediate distribution of the money necessary to cover them, they do not of course have any bearing on the distribution of the money necessary to cover appellant's claim. The only thing that is holding up the distribution of that money is appellant's action with regard to its suit in the state court.

It is insisted by the appellant that a judgment in the state court may be used as a basis of recovery against assets which the Duhme Company may subsequently possess, Appellant's Brief, pp. 11, 16. Aside from the improbability of such a thing, such assets, under the unimpeachable decree of the District Court, would belong to the Trustee in bankruptcy of the Keck Company, so that such a judgment would be worthless for that purpose. No possible pecuniary benefit can therefore result to it from such a judgment; on the other hand, injury has already resulted, and is now resulting, to the creditors of the Keck Company from its action in disregarding the order of the District Court commanding it to set up its claim therein for adjudication, to-wit; their inability to obtain payment of a dividend on their claims (Rec. 34), the expense of defending the various appeals, etc.

Furthermore the injunction as framed by the referee is only a temporary injunction, and may be dissolved after the distribution of the estate. This will give complete relief against all subsequently acquired assets which may not belong to the trustee. The injunction granted can have no effect on the appellant's right against the sureties on the lease as suggested on page 16 of its brief. A judgment against the principal is not essential to such a right and the appellant is more likely to lose its rights by failing to file its claim properly in the bankruptcy court than by failing to get an immediate judgment in a suit, the prosecution of which is enjoined.

That the bankruptcy court, after having acquired jurisdiction of the property of the bankrupt and of the alleged creditor, will not tolerate any step on his part which will interfere with, or disturb, or delay, or embarrass, the speedy administration and distribution of the estate, is clear from the following cases:

Keegan vs. King, 96 Fed. 758.

In re Kleinhaus, 113 Fed. 107.

In re Gutman, 114 Fed. 1009, approved in re Leeds Woolen Mills, 129 Fed. 922, at p. 928.

In re Hornstein, 122 Fed. 266, where the court said, p. 271:

"It is plain that the judge of a court of bankruptcy may lawfully grant such restraining order, operative on and binding litigants in the same court, although strangers to the bankruptcy proceedings, as may be necessary for the enforcement of the provisions of the bankrupt act. This

court has no hesitation in holding that express power is given by the act of Congress to courts of bankruptcy to enjoin all persons within its jurisdiction, whether litigants in a state court or elsewhere, from doing any act that will interfere with or prevent the due administration of the bankruptcy act. If this is not true, how frail and worthless is the law. In the face of a statute conferring the power, comity does not require the courts of the United States to compel persons whose rights are seriously jeopardized by proceedings in a state court to resort thereto for protection. This restraining order was properly granted, and must be upheld, if the petitioners had the right to institute this proceeding in involuntary bankruptcy."

In re Knight, 125 Fed. 35.

In re Mertens, 131 Fed. 507, 512, 513.

In re Swofford Bros. Dry Goods Co., 180 Fed. 549, where the court said, page 553:

"At the threshold of this discussion we are met by the contention of the defendant Rosier that the District Court, as a court of bankruptcy, has no power to enjoin or stay proceedings in a state court in a case such as this, that its power to interfere is limited to proceedings which impede the enforcement of the bankruptcy act or interfere with the administration of the estate in bankruptcy. It is contended that such is not the effect of the action in the state court. Subdivision 15 of Section 2 of the act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]) invests courts of bankruptcy with the power 'to make such orders, issue such process, and enter such judgments in ad-

dition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' It is said this section may be availed of to compel anything which ought to be done for, or to prevent anything which ought not to be done against the enforcement of the law; provided the court of bankruptcy otherwise has jurisdiction of the person or the subject-matter. For such purposes the court has the plenary powers of a court of equity and can exercise the powers of such a court for the ascertainment and enforcement of the rights and equities of the various parties interested in the estate of the bankrupt company. In re Siegel-Hillman Dry Goods Co. (D. C.), 111 Fed. 980-983; Dodge vs. Norlin, 133 Fed. 363-368, 66 C. C. A. 425; Barden vs. Hawarden Bank, 178 U. S. 524-535, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

"In re Rochford, et al., 124 Fed. 182-187, 59 C. C. A. 388, 393, the Court of Appeals of this Circuit, speaking through Judge Sanborn, said:

"The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of Congress it becomes a branch of equity jurisprudence. Property in the custody of a court of equity for administration is always held by it in trust for those to whom it rightfully belongs. The jurisdiction to inquire and determine who the lawful owners of it are, and to that end to call before it all claimants by a reasonable notice or order to present their claims to the court within a reasonable time, or to be barred of any right or interest in the property in its custody, or in its proceeds, is a power inherent to every court of equity, incidental and indispensable to the authority

to administer the property in its possession and to distribute its proceeds."

No good reason has or can be given why the Mitchell Company should not obey the order of the District Court and set up therein, fully and freely, its alleged claim against the Duhme Company. That claim, as we see it, falls within the following apt language used in the case of In re McCallum, 113 Fed. 393, Syl. 3 and 4:

"Where a bankrupt's estate has been converted into cash, and such cash is in the hands of the trustee in bankruptcy, a claim by a creditor for the payment of the full amount of his debt on the ground that it was for the value of goods which had been only consigned to the bankrupt, the title remaining in the creditor, but which had been converted into cash by the trustee, is nothing more than a claim against a fund in the hands of the court, which the court, as an incident to the power to distribute, has the right to hear and determine.

"Such claim, being a claim to a *superior right to a fund about to be distributed, and in which all of the other creditors of the bankrupt were interested*, should be determined in the District Court, *where the other creditors might be heard in defense of their rights*, and an application for leave to sue upon such claim in the state court should be refused."

If it has any claim at all, it must be on the theory that the assets of the Duhme Company, belonging to and owned by the Keck Company, have come into the hands of that Company's Trustee subject to, or impressed with, liens or equities in favor of persons who dealt with it in good faith

on the theory that it was a separate corporation, having property and assets of its own, etc. All of the cases cited under III. hold that the bankruptcy court can and will determine, in a way that will give creditors a full and proper opportunity of being heard, whether such liens, or equities, or interests exist, and if so, protect them. As a matter of fact, the District Court in the present case has already decided, not only that the claims of all persons who dealt in good faith with the Duhme Company shall be paid in full, but that the appellant made its lease to that company in good faith, etc. (Rec. 54). The only thing necessary for it to prove therefore is the amount due to it as such a creditor; the money to pay that amount when found by the court is in its hands for that purpose. Is the appellant fearful that the District Court will not give it a full and fair hearing on that question, or that it will deny to it some substantial right which it possesses?

The method adopted by the Trustee for the determination of the amount of its claim is one which Judge Lurton, in McMahon's case, supra, at page 687, described as a plenary one, and one, to use his language and that of Mr. Justice Day in Whitney vs. Weman, supra, at p. 553, "wherein the parties can be fully heard after the due course of equitable procedure."

VI.

The present case is no different from the ordinary one of a bankrupt owning say, five pieces of real estate absolutely unencumbered, and one piece against which SOME of his creditors have taken liens.

All of the real estate comes into the possession of the bankruptcy court *as the property of the bankrupt*. The one piece of real estate against which certain of his creditors have liens or claims is still his property and comes to the bankruptcy court as such; his creditors who share equally in the five pieces or its proceeds, also share equally in the other piece *after* it has paid any valid claims against it. In order to determine all the rights of the general creditors, it is necessary and proper that the court determine the rights of the special or secured creditors. There is nothing unusual or harsh about such a procedure. Instances of its exercise are McMahon's case, supra; In re Antigo Screen Door Co. supra, where the Circuit Court of Appeals for the 7th Circuit said, p. 253:

"That property was in equity the property of the bankrupt, subject to such lien as the mortgagee had thereon. If its value was in excess of a valid lien, that excess would go to the trustee. When, therefore, the property was turned over to the trustee as the property of the bankrupt, subject to the lien, the trustee held the property and its proceeds as assets of the bankrupt and in the bankruptcy proceedings."

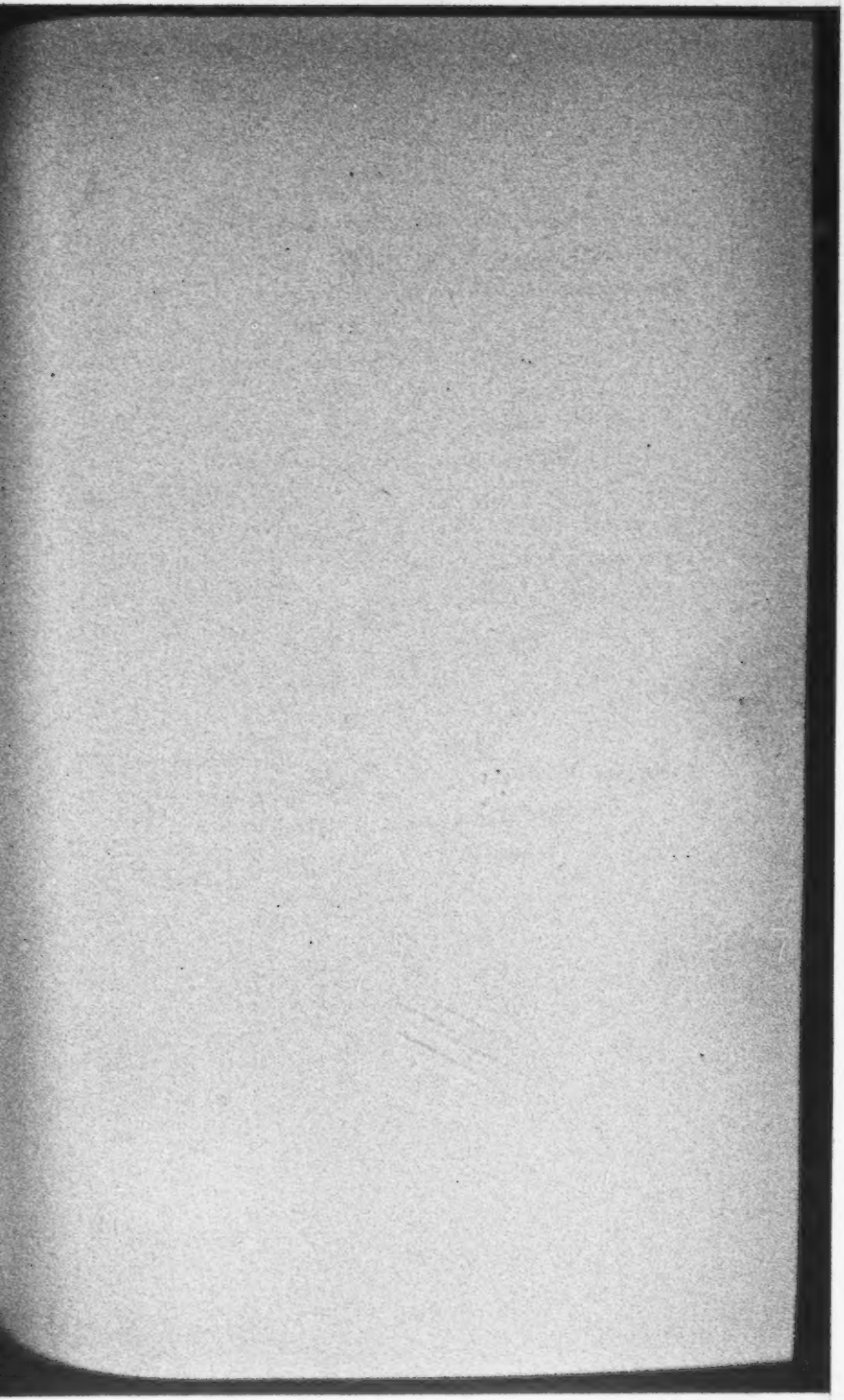
Wherein do such cases and the principle which they lay down differ from the case at bar? The Keck Company, the adjudicated bankrupt, owned the Duhme Company; it was

and always had been one of its assets; the Mitchell Company claims that it (Keck Company) permitted it to do business with the Duhme Company (its property) in such a way as to give it a right to have that property applied to the payment of its claim before the Keck Company's general creditors should share in it. Why has not the bankruptcy court the jurisdiction and right to determine that question and the amount due to appellant, as much as in the case of the mortgage of real estate, and why can it not dispose of the question just as equitably? *Why does the appellant fear to submit the merits of its claim to that court?*

We respectfully submit that the decree of the Circuit Court of Appeals should be affirmed.

JOSEPH S. GRAYDON,
JOSEPH L. LACKNER,
Counsel for Appellee.

LAWRENCE MAXWELL,
Of Counsel.



MITCHELL STORE BUILDING COMPANY *v.* CARROLL, TRUSTEE IN BANKRUPTCY OF HERMAN KECK MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 212. Argued January 28, 1914.—Decided February 24, 1914.

Section 24a of the Bankruptcy Act provides for appeals in controversies arising in bankruptcy proceedings and controls a proceeding brought by the trustee to restrain a landlord from prosecuting a suit for rent in the state court. In such a case the appeal takes the course prescribed in the Circuit Court of Appeals Act of 1891.

Although a case taken to the Circuit Court of Appeals under § 7 of the act of 1891 is not one of the class made final by § 6 of that act, the jurisdiction of this court under § 6 relates solely to final orders of the District Court reviewed by the Circuit Court of Appeals.

An interlocutory decree of the District Court granting a temporary injunction against prosecuting a suit in the state court, is not a final order, and from the judgment of the Circuit Court of Appeals affirming it there is no appeal to this court.

This court cannot entertain an appeal from a judgment of the Circuit Court of Appeals upon a petition to revise under § 24b of the Bankruptcy Act.

Appeal from 193 Fed. Rep. 616, dismissed.

THE facts, which involve the jurisdiction of this court of appeals in controversies arising in bankruptcy proceedings, are stated in the opinion.

Mr. P. Lincoln Mitchell and *Mr. Walter A. DeCamp* for appellant.

Mr. Joseph S. Graydon, with whom *Mr. Joseph L. Lackner* and *Mr. Lawrence Maxwell* were on the brief, for appellee.

MR. JUSTICE DAY delivered the memorandum opinion of the court.

An involuntary petition in bankruptcy was filed against The Keck Manufacturing Company on February 8, 1909, in the District Court of the United States for the Southern District of Ohio, and it was later adjudicated a bankrupt. Upon application a receiver was appointed for the Duhme Jewelry Company, an adjunct of The Keck Manufacturing Company, all of the stock of the former being owned by the latter company, and subsequently the receiver, in pursuance of an order of the court, transferred all the property and assets of The Duhme Jewelry Company to the trustee of the bankrupt, by him to be kept under separate account.

The Mitchell Store Building Company had leased certain premises to The Duhme Jewelry Company, which on June 30, 1910, the rent being paid to that time, the latter company vacated, although the lease had not yet expired. The Mitchell Store Building Company brought suit against The Duhme Jewelry Company in the Common Pleas Court of Hamilton County, Ohio, to recover under the lease, also applying to the District Court for an order on the trustee to withhold sufficient in amount of the assets of The Duhme Jewelry Company to satisfy its claim, which was eventually refused by the referee and is now before the District Judge upon petition for review.

Upon the petition of the trustee The Mitchell Store Building Company was made a party to the bankruptcy proceeding, in the District Court, and later the trustee

sought to restrain that company from prosecuting its suit in the state court. The District Judge granted a temporary injunction and upon appeal the Circuit Court of Appeals affirmed the order of the District Court. There was also a petition to review the order of the District Court granting the temporary injunction, but that was not passed upon by the Circuit Court of Appeals. The case was then brought to this court by appeal, the petition for appeal stating that "this cause is one in which the United States Circuit Court of Appeals for the Sixth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal."

The jurisdiction of the appellate courts of the United States, including this court, under the Bankruptcy Act, is regulated by §§ 24 and 25 of that act. Under the latter section appeals may be taken in certain cases from the District Court to the Circuit Court of Appeals, and, under certain limitations, appeals may be allowed from the latter court to this court, from final decisions of the Circuit Court of Appeals allowing or rejecting claims. This case does not come within § 25. Section 24a provides for appeals in controversies arising in bankruptcy proceedings and controls the present case. In such cases the appeal takes the course prescribed in the Circuit Court of Appeals Act (act of March 3, 1891, c. 517, 26 Stat. 826, 828). See *Hewit* v. *Berlin Machine Works*, 194 U. S. 296; *Coder* v. *Arts*, 213 U. S. 223.

It is undertaken to sue out the appeal in this case from the Circuit Court of Appeals under § 6 of the Circuit Court of Appeals Act, as the petition for allowance of appeal shows; while the appeal to the Circuit Court of Appeals was under § 7 of that act, as amended (act of June 6, 1900, c. 803, 31 Stat. 660), providing for an appeal from an interlocutory order of a District or Circuit Court, granting an injunction, to the Circuit Court of Appeals

in a cause in which an appeal from a final decree might have been taken under the act. No provision is made in this section, or in any other, for a further appeal, concerning such interlocutory orders, to this court.

Section 6 regulates appeals from the Circuit Court of Appeals to this court, providing that cases not made final by that section shall be entitled to review in this court. While this case, taken to the Circuit of Appeals under § 7, is not one of the class made final in that court by § 6, it is well settled that this court's jurisdiction under § 6 relates solely to final orders of the District Court reviewed by the Circuit Court of Appeals. The decree in the District Court being an interlocutory order granting a temporary injunction, and the Circuit Court of Appeals simply affirming that order, it is not a proper case for appeal to this court. *Kirwan* v. *Murphy*, 170 U. S. 205.

If this case were treated as an appeal from the judgment of the Circuit of Court Appeals, upon a petition to revise under § 24b of the Bankruptcy Act, this court would not entertain the appeal. *Holden* v. *Stratton*, 191 U. S. 115.

It follows that the appeal

Must be dismissed. The petition for a writ of certiorari filed in this cause is denied.

END

OF

CASE